TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 401

AMERICAN SURETY COMPANY OF NEW YORK, PETITIONER,

vs.

THE GREEK CATHOLIC UNION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 22, 1931

CERTIORARI GRANTED NOVEMBER 2, 1931

(36,215)

(36,215)

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[fol. 1] [Caption omitted]

IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 3290. Law

THE GREEK CATHOLIC UNION

v.

AMERICAN SURETY COMPANY OF NEW YORK and GEORGE KONDOR

DOCKET ENTRIES

Apr. 30, 1925.—Exemplification of Record from Court of Common Pleas of Allegheny County received and filed.

June 10, 1925.—Petition and order granting leave to amend Statement, alias summons to be issued as to George Kondor, filed & entered.

June 10, 1925.—Alias summons issued returnable 1st Mon. of July next.

June 15, 1925.—Amended Statement of Claim filed.

June 22, 1925.—Alias summons returned served with a copy of Statement on George Kondor by handing to and leaving a true and attested copy thereof with an adult member of his family at his residence at Southmont, Johnstown, Pa., June 20, 1925.

[fol. 2] June 29, 1925.—Affidavit of Defense raising questions of law filed and entered.

May 25, 1927.—Hearing.—Argued C. A. V. (Arg. List).

June 15, 1927.—Opinion filed and entered stating that judgment may be entered in this case on the question of law raised in favor of the defendant surety company.

June 18, 1927.—Order, on opinion, directing judgment be entered in favor of the defendant on the affidavit of defense raising questions of law; to which defendant excepts and at its request exception noted.

June 18, 1927.—Pursuant to order of Court, judgment is hereby entered in favor of the defendant on the affidavit of defense raising questions of law.

J. Wood Clark, Clerk.

June 18, 1927.—On petition, order made allowing writ of Error to petitioner, The Greek Catholic Union: Assignments of error filed.

June 18, 1927.—Bond on appeal filed and approved.

June 18, 1927.—Citation issued.

June 18, 1927.—Writ of Error awarded.

June 22, 1927.—Citation, with acceptance of service thereon mailed, with writ of error to Saunders Lewis, Jr. Clerk of U. S. Circuit Court.

June 24 1927.—Stipulation of counsel as to printing record filed.

Apr. 25, 1928.—Mandate from Circuit Court of Appeals reversing judgment of this Court, received and filed.

[fol. 3] Apr. 28, 1928.—Notice re mandate, directing that affidavit of defense be filed within fifteen days from service of notice, filed.

June 9, 1928.—Præcipe for appearance of Robert Hoerle, for defendant George Kondor, filed.

June 27, 1928.—Affidavit of Defense of George Kondor filed.

Oct. 3, 1928.—Affidavit of Defense of American Surety Co. of N. Y. filed.

Oct. 11, 1928.—Præcipe for issue filed.

May 6, 1929.—Trial opens, before Schoonmaker, J.

May 7, 1929.—Trial continues.

May 8, 1929.—Trial continues.

May 8, 1929.—Trial closed.

May 8, 1929.—Plaintiff's points filed.

May 8, 1929.—Points on behalf of American Surety Co. of N. Y. filed.

May 9, 1929.—The jury, being unable to agree upon a verdict, are discharged by the Court.

May 9, 1929.—Trial memorandum filed.

May 18, 1929.—Præcipe for Trial List filed.

May 6, 1930.—Trial opens, before Gibson, J.

May 7, 1930.—Trial continues.

May 8, 1930.—Trial closed.

May 8, 1930.—Plaintiff's points filed.

May 8, 1930.—Defendant's points filed.

May 8, 1930.—The jury find a verdict for the plaintiff in the sum of $46,800.—Verdict filed.

May 8, 1930.—Trial memo. filed.

May 12, 1930.—Motion for new trial and reasons filed.

Sept. 15, 1930.—Opinion and Order filed and entered refusing the motion for new trial.

[fol. 4] Sept. 16, 1930.—Præcipe for judgment on the verdict filed.

Sept. 16, 1930.—Pursuant to præcipe filed, judgment is hereby entered in favor of The Greek Catholic Union and against American Surety Co. of New York and George Kondor in the sum of $47,806.20, liquidated as follows:

Amount of verdict	$46,800.00
Interest from May 8, 1930	1,006.20
Total	$47,806.20

J. Wood Clark, Clerk.

Nov. 26, 1930.—On petition of defendant, order entered allowing appeal.

Nov. 26, 1930.—Citation issued.

Dec. 2, 1930.—Citation returned service accepted.

Dec. 4, 1930.—Citation mailed to Circuit Court of Appeals.

IN UNITED STATES DISTRICT COURT

AMENDED STATEMENT OF CLAIM—Filed June 15, 1925

ALLEGHENY COUNTY, ss:

The Greek Catholic Union, the plaintiff, has a just, true and lawful claim, and cause of action, in this case against the American Surety Company and George Kondor, the defendants, of which claim and cause of action the said plaintiff makes the following statement.

1. The plaintiff is a corporation, duly incorporated under the laws of the State of Pennsylvania, and having its prin-[fol. 5] cipal place of business at the Borough of Munhall (Homestead Post Office) in the County of Allegheny in said State; and its business is that of a Beneficial Society, which pays certain sums of money, to its members, as benefits, in case of death or disablement.

2. The defendant, American Surety Company, of New York, is a corporation under the laws of the State of New

York, and registered and licensed to do business in the State of Pennsylvania, and is engaged in the business of a Bonding or Surety Company, insuring, in consideration of compensation paid to it, the fidelity of persons holding positions of trust and responsibility in organizations such as the plaintiff and others.

3. The business of the plaintiff is conducted by its officers: among whom is one called the Treasurer, (also called and known as the Supreme Treasurer), whose powers, duties and responsibilities are defined and prescribed by the By-laws of the plaintiff corporation, as provided and ordained by Article 7, section 32 of said By-laws adopted by said corporation, June 17, 1922, which by-laws were those in force and governing the Treasurer and his office, during the period hereinafter mentioned and referred to; a true and correct copy of said By-laws is hereto attached and made part hereof, marked "Exhibit A".

4. During the years 1920, 1921, 1922, 1923 and the months of January, February and March 1924, the Treasurer of the plaintiff was said defendant, George Kondor, who held said office by virtue of due and proper election and re-elec-[fol. 6] tion thereto, by the General Conventions of the plaintiff; and he so continued to hold and occupy said office until April 1924, when he was dismissed therefrom, for the reasons hereinafter set forth, by action of the Supreme Assembly, which is a body composed of all the officers or the plaintiff corporation, under and by virtue of its powers and authority, as provided and ordained in Article 8 of said By-laws, a true and correct copy of which By-law is hereto attached and made part hereof, marked "Exhibit B".

5. By the provisions of said By-laws, Article 7, Section 32, paragraph 23, the Treasurer is required to furnish a surety bond, for the faithful discharge of his duties as such officer, in the sum of $100,000.00, as will appear on reference to said "Exhibit A", hereto attached.

6. In compliance with the above mentioned requirement for a surety bond, said Treasurer procured the defendant, the American Surety Company of New York, to so become his surety; and said defendant, for and in consideration of a cash premium paid to it for that purpose by the plaintiff,

made and entered into a contract, or bond of surety, with the plaintiff, original dated July 19, 1920, and by payment of annual premiums renewed from year to year, including the year ending July 20th, 1924, whereby it insured to the plaintiff the fidelity of said George Kondor in the discharge of his duties as such Treasurer of said corporation, the plaintiff, during his incumbency of that office; and by the terms of said bond, or contract, said defendant became [fol. 7] bound to reimburse and pay to the plaintiff any and all pecuniary loss which it should sustain by reason of any default or failure by said George Kondor, in the discharge of his duties as such Treasurer, as prescribed and required by said By-laws of the plaintiff; or through his failure to keep intact and absolutely to account for all funds of the plaintiff, as prescribed by said By-laws; or through the failure of any bank in which he deposited the funds of the plaintiff. Said bond, or contract, is of the type or kind known as a "Schedule Bond", and designated as a "C" Bond, and is the kind of bond required by said By-law to be furnished by the Treasurer. It includes both the offices of Manager and Treasurer; and the liability of the surety for defaults of the Treasurer is therein fixed and specified as not to exceed the sum of $100,000.00. A true and correct copy of said bond, or contract, is hereto attached and made part hereof, marked "Exhibit C".

7. Said George Kondor defaulted, and failed and neglected faithfully to perform and discharge his duties and obligations as Treasurer of the plaintiff, during his said term of office as such, and thereby large pecuniary loss of money and funds was sustained by the plaintiff. Said defaults of said Treasurer and the losses sustained by the plaintiff as the results thereof are set forth more specifically in the following paragraphs.

8. It is prescribed and required by said By-laws,—Article 7, section 32, paragraph (7),—as by reference to said "Exhibit A" will appear, that said Treasurer is forbid-en to [fol. 8] carry on checking account in bank, of the funds of the plaintiff, a sum more than $25,000.00 beyond the amount needed for monthly payment of death benefits; and all funds of the plaintiff, over and above said limited amount, he must deposit in interest bearing deposits with "safe Banks", or keep invested in bonds at the direction and in

the discretion of the Supreme Assembly of the plaintiff. The amount of money required for the monthly payment of death benefits, was, in the winter and spring of the year 1924, about $20,000.00. The maximum sum which the Treasurer was permitted, at that time, to carry on checking account in any bank or banks, was $45,000.00.

Said George Kondor disobeyed and violated the requirements and obligations so imposed on him in his said office of Treasurer, by allowing funds of the plaintiff which came into his hands, during the months of January, February and March, 1924, to accumulate in checking accounts in the Peoples State Bank, of Johnstown, Pa., of which Bank he himself was the president, to an amount of over $200,000.00, contrary to the provisions and terms prescribed by said By-laws; and by reason thereof great pecuniary loss and damage was sustained by the plaintiff, as is hereinafter shown.

9. It was prescribed and required by the said By-law, above cited, that surplus funds, over the amount limited as aforesaid for checking accounts in banks, should be deposited by the Treasurer in "interest bearing accounts in safe banks", or invested under the direction of said [fol. 9] Supreme Assembly. Said George Kondor disobeyed and violated requirement and provision of said By-law, by making and carrying deposits of such surplus money and funds of the plaintiff, in his hands as Treasurer, during said months of January, February and March, 1924, to the amount as aforesaid of $150,000.00 or more, not in interest bearing deposits in safe banks but in open checking deposits in said Peoples State Bank of Johnstown. Said Bank was not a "safe bank" for deposits of that size, but was the reverse thereof. The capital of said Bank was only $50,000.00, and its assets and resources were not sufficient in amount or quality to make a deposit of that size safe; all of which said George Kondor, being himself the president of said Bank, knew. By reason of said default and violation of his duty as Treasurer, on the part of said George Kondor, great pecuniary loss and damage was sustained by the plaintiff, as is hereinafter shown.

10. It is prescribed and required by said By-laws,—Article 7, section 32, paragraph (2),—as by reference to said "Exhibit A" will appear, that the Treasurer shall pay

all checks drawn and signed by the Financial Secretary, and signed by the President of the Union,—the plaintiff. It was, during the time of said George Kondor's term of office as Treasurer, and long before, and since said time, the established custom and course of business of the plaintiff, in making payments of death benefits of members, and other regular, ordinary business, that such payments should be first approved by the Financial Secretary, and checks or [fol. 10] warrants drawn and signed by him therefor upon the bank deposits, made by the Treasurer to the credit of the plaintiff; and such checks then submitted to the President for his approval and signature: after which said checks are, and were then, sent to the Treasurer for him to sign and forward to the parties entitled to receive the same. It was the duty of the Treasurer to sign such checks and forward them to their proper destinations promptly, so that the parties entitled to such payments might receive them without delay, and, also, so that funds might not unduly accumulate in such bank deposits. Said George Kondor neglected and failed to perform his duty and discharge his obligation in this respect, in that, instead of signing and forwarding promptly a large number of such checks, so as aforesaid drawn upon said Peoples State Bank of Johnstown and signed by said other officers and sent to him in the months of February and March, 1924, he retained said checks in his possession, and did not send them to the parties entitled to receive them until the last of March, whereby money of the plaintiff, on deposit in said bank, was retained there instead of being paid out as should have been done. The amount of such checks outstanding and unpaid on March 31st, and which should have been paid out long before that date, was about $77,000.00. Great pecuniary loss was sustained by the plaintiff, as will hereafter be shown, as the result of said default of said Treasurer.

11. The plaintiff sustained pecuniary loss and damage from the aforesaid default and failure of said George Kon- [fol. 11] dor in the faithful performance and discharge of his duties and obligation as such Treasurer of the plaintiff, in the manner and to the extent herein stated and set forth as follows.

On or about April 1st, 1924, said Peoples State Bank of Johnstown, Pa., was found to be insolvent and unable to

meet its obligations. Payment of checks upon said Bank, to the amount of $89,000.00, drawn by the plaintiff, and duly signed by the proper officers including said Treasurer was refused; and the Pennsylvania State Commissioner of Banking took charge of the affairs of said Bank on the 4th day of April, 1924, and under his direction an examination of the affairs of said Bank was made at once, whereby it was developed that said Bank would not be able to pay more than forty (40) per cent of its obligations if it should be at once thrown into liquidation. An attempt was then made by the officers of said Bank, with the consent and assistance of said Commissioner of Banking, to obtain assistance from other banking institutions in Johnstown, by which aid might be extended to said Bank, to enable it, if possible to realize the most possible from such assets as it had, and minimize losses to its depositors and others. The result of these efforts was that the United States Trust Company of Johnstown agreed to take over the assets and business of said Peoples State Bank, and eventually pay out its depositors; but said United States Trust Company expressly stipulated, and made it a condition of its said proposal, that the plaintiff, which was the largest depositor of the Peoples State Bank, [fol. 12] should agree to keep $200,000.00 of its funds on deposit with said Trust Company, without interest for a period of four (4) years unless before that time it might be able to fully realize that amount from the assets of said Peoples State Bank, in addition to such amount as would be required to pay off other depositors and claims.

12. The Executive Officers and the Board of Trustees of the plaintiff having been called together especially for the occasion, and having consulted the agents of defendant, and fully informed them of said facts, agreed to accept the terms of the proposition from the United States Trust Company, being moved thereto by the evidence, developed on said investigation of said Peoples State Bank, from which it was apparent that if the plaintiff should insist upon unconditional payment of its claims as a depositor, said Bank could be forced into immediate liquidation; and the result would be that the plaintiff would suffer a loss of $150,000.00 or more on its deposits. An aggrement, as proposed as aforesaid, was accordingly made with said

United States Trust Company, and the Supreme Assembly of the plaintiff, having been called, immediately, in special session, satisfied said agreement, and, also, dismissed said George Kondor from said office of Treasurer; and said funds were so deposited with said Trust Company.

13. The plaintiff avers that by reason of the facts aforesaid, it was in fact compelled to enter into said agreement with said Trust Company, in order to avoid greater loss [fol. 13] to itself and, also to said defendant, as the result of said default of said George Kondor; and further avers that it, the plaintiff, is by reason thereof compelled to lose the use of said sum of $200,000.00 for four (4) years; and was, also, obliged to borrow money temporarily for its current needs to the amount of $30,000.00, for which it had to pay interest, to the amount of $571.00. Plaintiff could have invested said funds in good, safe and lawful investments on terms by which it could have realized at least 5.2 per cent per annum as interest thereon; wherefore it had lost, and will lose, by reason of these facts, interest at that rate for four (4) years upon $200,000.00; that is to say $41,600.00. And said Sum of $41,600.00 together with said sum of $571.00 interest on temporary loans, are pecuniary loss sustained by plaintiff through the defaults and failures of said George Kondor, as Treasurer of said plaintiff, for which the defendant, under its said bond or contract as surety for said George Kondor is liable, and which it, said defendant, bound itself and promised to pay to the plaintiff.

14. And plaintiff further avers that it was obliged to incur great expense on account of said defaults of said George Kondor, which it would not otherwise have had to incur, and which were a pecuniary loss and damage to it in this; that the emergency created by the failure of said Peoples State Bank of Johnstown, to pay said checks, made it necessary to call together in special session the Supreme Officers of the plaintiff, constituting the Board of Trustees and the Supreme Assembly of the plaintiff, many [fol. 14] of whom lived at a distance from the home office of plaintiff, and to have said officers, also, go to Johnstown in order to properly attend to the urgent business in hand; and the plaintiff was obliged to pay expenses of railroad fare and hotel bills of said officers while so engaged; also,

plaintiff had to employ legal counsel, viz, Thomas S. Brown and Ralph C. Davis, Esquires, and have them attend said meetings of said officers at Homestead and at Johnstown, and pay their expenses and fees and charges for their services in that behalf. Said costs and expenses so paid by the plaintiff amount in all to the sum of $2,948.93, and an itemized list thereof is shown in the statement hereto attached and made part hereof marked "Exhibit D." Plaintiff avers that said costs and expenses are a pecuniary loss, caused to it by the said defaults of said George Kondor, as Treasurer, for which the defendant *the defendant,* under its said bond or contract of surety for said George Kondor is liable, and which it, the said defendant, bound itself and promised to pay to the plaintiff.

15. During said time when said George Kondor occupied said office of Treasurer of the plaintiff, the plaintiff placed in his hands, as Treasurer, in the course of his duties as such officer, from time to time, certain sums of money which were benefits payable to beneficiaries residing in Europe, and it was his duty to remit said sums to the proper beneficiaries and obtain receipts therefor and return said receipts to the office of the Supreme Financial Secretary in proper time. The duties of said Treasurer [fol. 15] in this respect are prescribed in said By-law, Article 7, Section 32, paragraphs 13 to 16 inclusive, as by reference to said "Exhibit A" will appear; and, also in Article 13, section 133 of said By-laws, a true and correct copy of which by-law is hereto attached and made part hereof marked "Exhibit E."

Said funds so placed in the Treasurer's hands for remittance are charged to him, and he becomes accountable to the plaintiff therefor, and can only discharge himself from said liability by producing to the F-nancial Secretary proper receipts from the beneficiaries. Said George Kondor is so charged with funds so received by him for sundry remittances during his said term of office, and for which he has not made any return of receipts by beneficiaries in the sum of $4,950.16, and in this respect he has made additional default in the discharge of his duties as such Treasurer, and plaintiff has sustained and will sustain pecuniary loss thereby, for which loss the defendant is liable,

under its said bond or contract of surety, and which it bound itself and promised to pay to the plaintiff.

16. The plaintiff has demanded payment from said George Kondor of the several sums of money above set forth and stated, as losses sustained by it through his default and failure to faithfully perform the duties of his said office of Treasurer, but he has hitherto wholly neglected and failed to pay the same or any part thereof. Said George Kondor resides in Cambria County, Pennsylvania, and could not be served with legal process in this suit when brought in the Common Pleas Court of Alle-
[fol. 16] gheny County Pennsylvania; but since the removal of this case into the District Court of the United States, he has been joined as a defendant by amendment.

The plaintiff has, likewise, made demand of the defendant, the American Surety Company of New York, as surety for said George Kondor, as aforesaid, for payment of said several sums of money, so as aforesaid lost by it, and for which said surety is liable, but said defendant has hitherto wholly neglected and refused to pay the same or any part thereof.

Wherefore the plaintiff brings this suit to recover of said defendants said several sums of money herein above specified, and which are collectively set forth and shown on the schedule hereto attached and made part hereof, marked "Exhibit D," and which in the aggregate amount to the total sum of $50,070.09, together with interest thereon from April 1st, 1924, the date when said default of said Treasurer was discovered.

T. S. & O. W. Brown, Ralph C. Davis, Attorneys for Plaintiff.

Duly sworn to by Michael Yuhasz, Sr. Jurat omitted in printing.

[fol. 17] EXHIBIT "A"

Article 7—Section 32

This exhibit read in evidence—See p. 45.)

EXHIBIT "B" TO AMENDED STATEMENT OF CLAIM

Article 8

Section 37. The Supreme Assembly of the Greek Catholic Union is the chief and executive and directory body of the organization it consists of the following Officers collectively, viz:

(1) The Spiritual Advisor.

(2) The President.

(3) Three Vice Presidents; One for the State of Pennsylvania, one for the States of Ohio, Indiana and Illinois; one for the States of New York, New Jersey and Connecticut.

(4) Three Lady Vice Presidents; One for the State of Pennsylvania; one for the States of Ohio, Indiana and [fol. 18] Illinois; One for the states of New York, New Jersey and Connecticut.

(5) The Vice-President for the Gymnastic Branch.

(6) The Financial Secretary.

(7) The Assistant Financial Secretary.

(8) The Secretary of the Gymnastic Branch.

(9) The Secretary of the Youth's Branch.

(10) The Treasurer.

(11) The Three Supreme Auditors.

(13) The Standard Bearer.

(14) The Editor-in-Chief.

(15) The Legal Advisor.

38. All the affairs, business and interests of the Union shall be managed, controlled and directed by the Supreme Assembly and, in the intervals between the conventions, it shall have and exercise all the corporate rights and powers of the Union as a corporation, including power to bind the Union by contracts, and shall administer order and direct all those activities, except in so far as by the By-laws, certain powers and duties are expressly appropriated and

delegated to certain supreme officers; but the Supreme Assembly shall not have right or power to alter or amend the charter or By-laws of the Union, nor shall it have any authority or jurisdiction in trials of complaints of any sort, jurisdiction as to such matters being exclusive in the officials and tribunals designated thereof in these By-laws; and in any action concerning disposition of property of the corporation; a majority of the corporation trustees must concur.

[fol. 19] 39. The President of the Union shall be the head of the Supreme Assembly and shall preside over all its meetings, or in his absence the Vice-President and the Ass't. Fin. Secretary of the Union shall keep the minutes and attend to the correspondence of the Supreme Assembly.

40. The Supreme Assembly shall have its office at the principal office of the corporation, the Greek Catholic Union of Rusin Brotherhoods, as designated in its charter.

41. The Supreme Assembly shall hold an Annual Meeting, for the transaction of all business of the Union, at its office on the day of — each and every year; and shall hold such other stated meetings as it may by a rule adopted by it, consider necessary or proper; and shall hold Special Meetings when called for that purpose by the President.

At the meetings of the Supreme Assembly a majority of the members of the body shall constitute a quorum to do business.

42. Officers attending the meetings of the Supreme Assembly shall be entitled to receive traveling expenses and per diem compensation, the same as is provided for them in attendance at the convention.

43. The Supreme Assembly shall have power to fill all vacancies occurring for any reason, in the Supreme Office of the Union, except the offices of the President and Vice President, the appointees of the Supreme Assembly in such cases to hold such offices for the unexpired terms thereof, unless removed sooner in proper manner.

[fol. 20] In case of a vacancy in the office of the President the First Vice-President fills the office of the President; and in case of vacancy in both those offices at one time, the Second-Vice-President shall become the President of the Union.

44. The Supreme Assembly shall prepare and publish a Code of By-laws suitable for the government of Local Assemblies, and every Local Assembly must adopt By-laws for its own government, which shall be either identical with the Code so prepared, or in conformity with same in all essential features, with such additions thereto as may be required for their special uses; provided that all such By-laws must be in conformity with the Charter and By-laws of the Union, and with the laws of the United States, and of the state in which the Local Assembly may be located.

EXHIBIT "C"

(This exhibit read in evidence. See p. 52.)

[fol. 21] EXHIBIT "D" TO AMENDED STATEMENT OF CLAIM

Itemized Statement of Account

The American Surety Company of New York, N. Y., to Greek Catholic Union, Dr., for Loss Sustained by Default of George Kondor in the Office of Supreme Treasurer of the Greek Catholic Union

March 31:

Loss of 4 years interest on $200,000.00 deposited with United States Trust Company of Johnstown according to agreement at 5.2 per cent per annum		$41,600 00
Interest on notes for money borrowed for current needs		571 00
Expenses incurred by Greek Catholic Union in obtaining funds on deposit by Treasurer in Peoples State Bank of Johnstown, Pa. R. R. Fare for Members of Board of Trustees	$342 33	
Hotels, Telegrams and Meals for same at Johnstown, April 4, 5 and 6	126 60	
Per diem compensation for same, as per By-laws 55½ days at $8.00 per day	440 00	
		908 93

[fol. 22] Fees paid Attorneys T. S. Brown and Ralph C. Davis, for professional services 2,000.00
Expenses paid same, for attendance at Johnstown 40.00
2,040.00
Foreign Remittances not accounted for to Jan. 1st, 1925 ..... 4,950.16
$50,070.09

EXHIBIT "E" TO AMENDED STATEMENT OF CLAIM

Article 13—Section 133

If a widow or other adult beneficiary is found to be living in the old country and the subordinate lodge so informs the Supreme Lodge, the check for the payment of the sum payable to such beneficiary shall be made to the order of the Supreme Treasurer and shall deliver it to the beneficiary and have the signature to the beneficiary through the agency of a responsible bank, who shall deliver it to the beneficiary and have the signature to the endorsement properly attested by two witnesses.

Service of copy of within Statement of Claim accepted this 15th day of June, 1925.

E. W. Arthur, of Counsel for American Surety Co. of N. Y.

[fol. 23] You are required to file an affidavit of defense to this Statement of Claim within fifteen (15) days from the service thereof.

T. S. and O. W. Brown, Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF DEFENSE OF AMERICAN SURETY CO.—Filed October 3, 1928

WESTERN DISTRICT OF PENNSYLVANIA,
County of Allegheny, ss:

Before me the undersigned authority personally appeared A. A. Rohrich, who being duly sworn deposes and

says that he is Resident Vice President and Manager at Pittsburgh, of the American Surety Company of New York one of the defendants above-named; is familiar with the facts of this case and duly authorized hereunto and that the said American Surety Company of New York has a full, just and legal defense to the whole of plaintiff's claim, the nature and character of which defense is as follows to-wit:

1. The averments of paragraph one of plaintiff's amended statement of claim are admitted.

2. The averments of paragraph two of plaintiff's amended statement of claim are admitted.

3. The averments of paragraph three of plaintiff's amended statement of claim are admitted.

4. The averments of paragraph four of plaintiff's amended statement of claim are admitted in the following particular to-wit: That "During the years, 1920, 1921, [fol. 24] 1922, 1923 and the months of January, February and March, 1924, the treasurer of the plaintiff was said defendant, George Kondor, who held said office by virtue of due and proper election and re-election thereto, by the General Conventions of the plaintiff; and he so continued to hold and occupy said office until April 1924, * * *" This defendant, however, denies that the said George Kondor was dismissed from said office as set forth in paragraph four of plaintiff's amended statement of claim.

5. The averments of paragraph five of plaintiff's amended statement of claim are admitted.

6. The averments of paragraph six of plaintiff's amended statement of claim are admitted.

7. The averments of paragraph seven of plaintiff's amended statement of claim are denied.

8. It is admitted as set forth in paragraph eight of plaintiff's amended statement of claim that the by-laws of plaintiff association forbid the treasurer to carry on checking account in bank, funds of the association in excess of $25,000.00 beyond the amount needed for monthly payment of death benefits and that all funds of the plaintiff over and above said amount are required to be deposited in interest bearing deposits or invested as in said paragraph set forth.

This defendant denies, however, that the amount of money required for the monthly payment of death benefits was in the winter and spring of the year 1924, about $20,000.00 and further denies that the maximum sum which the treasurer was permitted at that time to carry on checking account in any bank or banks, was $45,000.00. This defendant further denies that as set forth in paragraph eight of the amended statement of claim, George Kondor disobeyed [fol. 25] and violated the requirements and obligations imposed upon him in his office as treasurer in the manner set forth in the last section of said paragraph or ortherwise howsoever and denies that by reason thereof or otherwise, great pecuniary loss and damage was sustained by the plaintiff.

And for further answer to the averments of said paragraph eight, this defendant avers that the deposit and investment of said moneys was by the Constitution and By-laws of said plaintiff Union made subject to the management, control, and action of the Supreme Officers of the Union and that this defendant had no control over such deposit and investment; and further that said George Kondor had for several years carried like or equal balances during several years preceding 1924 in the same banks and in like manner as he was carrying said balances from January to April inclusive of the year 1924. Said Kondor's accounts, statements and returns were from time to time duly made to the Supreme Auditors and to the Supreme Assembly of said Union and said Supreme Auditors and said Supreme Assembly were fully informed at all times as to the depositaries and the amounts on deposit in each and said depositaries and deposits respectively were had and made with the consent, approval and acquiescence of the said Supreme Auditors and Supreme Assembly of said Union.

9. This defendant denies the averments of paragraph nine of the amended statement of claim insofar as said paragraph avers that the said George Kondor disobeyed and violated the requirements and provisions of the By-[fol. 26] laws by making and carrying deposits of surplus money and funds of the plaintiff in his hands as treasurer as in said paragraph set forth and denies that at the time

of the making of said deposits, said bank was not a safe bank for deposits of that size but was the reverse thereof and this defendant further denies that as set forth in said paragraph nine, the assets and resources of said bank were not sufficient in amount or quality to make said deposit safe and that of this the said George Kondor knew and denies that by reason of any default or violation of his duty as treasurer on the part of the said George Kondor, any pecuniary loss or damage was sustained by the plaintiff.

10. This defendant denies the averment of paragraph ten of the amended statement of claim insofar as said averment relates to any established custom and course of business of the plaintiff in making of payments of death benefits of members and other ordinary business and denies that the said George Kondor neglected and failed to perform any duty and discharge any obligation during the months of February and March, 1924, or at any other time in regard to the signing and forwarding of checks as set forth in said paragraph ten. This defendant further denies that the amount of such checks outstanding and unpaid on March 31st and which should have been paid out long before that time, was about $77,000.00 and that great pecuniary or any pecuniary loss was sustained by plaintiff by reason thereof or by reason of any default on the part of said treasurer.

11. This defendant denies that as set forth in paragraph eleven of the amended statement of claim on or about [fol. 27] April 1, 1924, said Peoples State Bank of Johnstown, Pennsylvania, was found insolvent and unable to meet its obligations and that the Pennsylvania State Commissioner of Banking took charge of the affairs of said bank on the fourth day of April 1924 and that said bank would not be able to pay more than forty (40) per cent of its obligations if it had then been thrown into liquidation. This defendant is not informed as to efforts made to obtain assistance from other banking institutions as set forth in said paragraph eleven except through hearsay nor except by like hearsay as to the proposal made and agreement entered into with the United States Trust Company of Johnstown to take over the affairs and business of said Peoples Bank and is advised that the averments relating thereto in the amended statement of claim are immaterial to this issue. This defendant avers that it has exhausted

all sources of knowledge which are open to it for the purpose of determining the truthfulness of said averments and that through its inability to obtain any reliable information on the subject coupled with its general knowledge of the matter, it believes the allegations to be untrue and avers its expectations so to prove. Wherefore defendant denies that plaintiff sustained pecuniary loss and damage from any default or failure of the said George Kondor in the faithful performance and discharge of his duties and obligations as treasurer of plaintiff in the manner and to the extent set forth in said paragraph eleven or otherwise howsoever.

12. This defendant denies the averments of paragraph twelve of the amended statement of claim to the effect that [fol. 28] the Executive Officers and Board of Trustees of plaintiff consulted the agents of defendant and fully informed them of the facts of said case and avers that at no time prior to the taking over of the assets and business of said Peoples State Bank, was any information conveyed to any person or persons connected with the defendant except that at or shortly after midnight of Saturday, April 5, 1924, a long distance telephone call purporting to come from some person at Johnstown, Pa., representing plaintiff, was made to the home of one of the employees of this defendant connected with the business agency of defendant in the City of Pittsburgh which said employee was without authority and was well known to plaintiff to be without authority to bind this defendant by any act or omission in regard thereto. This defendant further says that when its said employee answered the telephone he was immediately met with the statement that unless defendant forthwith paid over the sum of $100,000 the Peoples State Bank at Johnstown would close its doors at 9 o'clock A. M. the following Monday; that thereupon, said employee replied that he was entirely without authority in the matter and could not even lay before the defendant any information that might be given him until after the day and hour mentioned. Thereafter, and before daybreak of Sunday morning, said employee was again called to the telephone and was informed that the matter had been settled and an agreement actually entered into by the Peoples State Bank and the U. S. Trust Co. both of Johnstown, and plaintiff, whereby [fol. 29] said Trust Company would assume the payment

of the depositors of said bank upon terms agreed to by plaintiff.

This defendant avers that said call was made late Saturday night or early Sunday morning and any action of plaintiff was had and completed before such information could possibly have been communicated to this defendant or action had by it; that said plan was not submitted to this defendant nor approved by it nor was proper opportunity of consideration given this defendant in the circumstances, but the taking over of said State Bank by said Trust Company was precipitate, was without the consent or approval of this defendant, in prejudice of its rights and operated to discharge this defendant of and from its liability as surety, if any there had been. As to the remaining averments of paragraph twelve, this defendant has exhausted all sources of knowledge which are open to it for the purpose of determining the truthfulness of the averments of paragraph twelve of the amended statement of claim and from its inability to obtain any reliable information on the subject coupled with its general knowledge of the matter, it believes the allegations to be untrue and avers its expectations so to prove.

13. This defendant denies the averments of paragraph thirteen of plaintiff's statement of claim and says that the averments therein as to loss of interest and earnings even if they had been true, are speculative and irrelevant to this issue.

14. This defendant is advised that even if true, the averments of paragraph fourteen of the amended statement of claim do not set forth a lawful item of claim against this [fol. 30] defendant and further that as to the averment of the amount of costs and expenses alleged in said paragraph to have been paid by plaintiff as set forth in its "Exhibit D", defendant alleges that it has exhausted all sources of knowledge which are open to it for the purpose of determining the truthfulness of said averments and that from its inability to obtain any reliable information on the subject coupled with its general knowledge of the matter, it believes the allegations to be untrue and aver its expectations so to prove.

15. This defendant is advised that the averments of paragraph fifteen of the amended statement of claim are in-

sufficient in law to charge it with any liability to plaintiff and further denies that plaintiff has sustained or will sustain any pecuniary loss for which this defendant is liable or any loss by reason of any act or omission of the said George Kondor as set forth in said paragraph, for which this defendant has in anywise bound itself or promised to pay.

16. This defendant denies any knowledge or information of any demand made upon George Kondor as set forth in paragraph sixteen of plaintiff's statement and that said averment is material to this issue and if the Court shall rule that said averment is material, this defendant demands proof of the allegation.

This defendant admits demand on the part of plaintiff for payment as set forth in paragraph sixteen of the amended statement of claim and avers that it is not liable to plaintiff in the amount as set forth therein or in any other amount whatsoever.

17. For further statement of its defense to the claim of plaintiff herein, this defendant avers that it is informed [fol. 31] and believes and expects to be able to prove upon the trial of this cause, that George Kondor, the other defandant herein and principal upon the bond whereon this defendant is surety made regular monthly reports from time to time to his superior officers including the Supreme Auditors of the plaintiff Union and that said superior officers individually and as the governing body of said Union, had full knowledge of the affairs of said Union and of the action and actions of the said George Kondor and of his conduct of the said office of treasurer and audited and approved the same during his entire term of office; that the treasurer of plaintiff Union had no power under its Constitution and By-laws, of his own volition or initiative to make withdrawals of its funds for investment or otherwise, but only upon check or orders drawn and signed by the Financial Secretary and the President of the Union or according to the direction of the Supreme Assembly of the Union, the chief executive body thereof, and if the said Kondor did or omitted to do any of the acts or things whatsoever with which he is charged in the amended statement of claim, such and all of such acts and omissions on the part of said George Kondor were either with the knowledge

and acquiesence or at the direction of the executive officers and board of trustees of the plaintiff Union and this defendant is not liable by reason of any loss which may or might have resulted from such acts or omissions on the part of said George Kondor, and no notice or complaint thereof was ever given to this defendant prior to April 5, 1924.

[fol. 32] 18. This defendant avers that if plaintiff entered into any contract or agreement with the United States Trust Company as set forth in paragraphs eleven and twelve of the amended statement of claim, such action was without notice to this defendant, without its consent, approval or acquiescence, in prejudice of its rights and deprived this defendant of an opportunity to secure itself against loss and thereby this defendant is advised and believes it was relieved and discharged of any liability upon its said bond.

19. This defendant avers that if plaintiff entered into an agreement with the United States Trust Company of Johnstown as set forth in paragraphs eleven and twelve of amended statement of claim, such action was had without notice to this defendant, to the prejudice of this defendant's rights, and in collusion with the other parties to said contract for the sole purpose on the part of plaintiff of saving itself from greater loss and by the sacrifice and to the prejudice of this defendant's rights; and this defendant avers that it is advised that by reason thereof, it was relieved and discharged of any liability.

20. This defendant renews the matters of defense set up in its affidavit of defense raising questions of law heretofore filed to-wit:

(a) Said statement of claim as amended does not sufficiently aver any pecuniary loss sustained by plaintiff by reason of any act or omission of said George Kondor for which this defendant is liable as therein set forth.

(b) Said statement of claim as amended does not suffi-
[fol. 33] ciently aver any pecuniary loss sustained by plaintiff by reason of any act or omission of said George Kondor for which this defendant is liable as therein set forth.

(c) The averments of the statement of claim as amended do not disclose any act or omission on the part of the said George Kondor contemplated by the bond or contract of surety whereon plaintiff's action in this case is brought.

(d) The averments of plaintiff's statement of claim, even if true, are not sufficient in law to sustain a verdict or judgment thereon against this defendant.

(e) The averments of the statement of claim, if true, disclose a case where the loss, if any, sustained by plaintiff was occasioned by the affirmative action of Plaintiff's Supreme Assembly or governing board and was not due to any default or want of faithful performance on the part of George Kondor, treasurer of plaintiff, and therefore this defendant is not liable therefor.

(f) The averments of plaintiff's statement of claim are generally insufficient in law.

All of which is correct and true as deponent is advised and believes and as this defendant expects to be able to prove upon the trial of this cause.

A. A. Rohrich.

Sworn to and subscribed before me this 14th day of June, 1928. My Commission Expires April 21st, 1931. M. B. Burroughs, Notary Public. (Seal.)

[fol. 34] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF DEFENSE OF GEORGE KONDOR—Filed June 27, 1928

WESTERN DISTRICT OF PENNSYLVANIA,
County of Allegheny, ss:

Before me the undersigned authority, personally appeared George Kondor, defendant abovenamed, who being duly sworn deposes and says that he has a full, just and legal defense to the whole of plaintiff's claim as set forth in its amended statement filed, the nature and character of which defense are as follows:

1. Defendant admits the averments of paragraph "1" of the amended statement of claim.

2. Defendant admits the averments of paragraph "2" of the amended statement of claim.

3. Defendant admits the averments of paragraph "3" of the amended statement of claim.

4. Defendant admits the averments of paragraph "4" of the amended statement of claim, except that defendant denies that he was dismissed from the office of Treasurer of plaintiff Union for the reasons in said statement set forth.

5. Defendant admits the averments of paragraph "5" of the amended statement of claim.

6. Defendant admits the averments of paragraph "6" of the amended statement of claim.

7. Defendant denies the averments of paragraph "7" of the amended statement of claim.

8. Defendant admits the averments of the first sentence of paragraph "8" of the statement of claim referring to provisions of the By-laws, Article 7, Section 32, paragraph 7, but denies the averments of the second and third sen- [fol. 35] tences of said paragraph, relating respectively to the amount of money required for monthly payment of death benefits and to the maximum sum permitted to be carried at that time on checking accounts. Defendant avers that not only for death benefits but for other necessary disbursements, the sum required to be kept on checking account during the period in question was far in excess of the amounts named.

Defendant further denies that as set forth in the second section of said paragraph "8" of the amended statement of claim or otherwise he disobeyed or violated the requirements and obligations imposed upon him as Treasurer of plaintiff during the time therein specified or at any other time, or that he permitted then or at any other time, the accumulation of $200,000 or any other sum in any bank contrary to the provisions of the By-laws of plaintiff Union, or that through any act or acts or course of conduct of defendant, said plaintiff at any time suffered loss or damage.

9. Defendant admits the averments contained in the first sentence of paragraph "9" of the amended statement of claim. But defendant denies the remaining averments of said paragraph and avers that the deposits made by him

in good faith in the Peoples State Bank were so made and maintained pursuant to instructions and authority given him by the Supreme Assembly, being the governing body of plaintiff Union. Defendant further says that under the [fol. 36] constitution and By-laws of plaintiff, he, the Treasurer had no control over nor right of withdrawal of the funds in his account in said Bank, but that said funds were at all times subject to the exclusive control of the Supreme Assembly and withdrawal could be made only upon check drawn and signed by the Financial Secretary, countersigned by the President and delivered to the Treasurer; that the amount of said funds and place of deposit thereof were at all times known to the Supreme Assembly and that said Supreme Assembly at all times approved, consented to, and acquiesced in the deposits made by defendant and the amount and depositary thereof.

10. Defendant admits the averments of the first, second and third sentences of paragraph "10" of the amended statement of claim, but denies the averments of the remainder of said paragraph.

11. Defendant denies the averments of the first section of paragraph "11" of the amended statement of claim, and further denies that on or about April 1, 1924, the Peoples State Bank of Johnstown, Pa., was found to be insolvent and unable to meet its obligations; that on April 4, 1924 the Pennsylvania State Commissioner of Banking took charge of the affairs of said Bank; that said Bank if then thrown into liquidation would not have been able to pay more than 40% of its obligations. As to the remaining allegations of said paragraph beginning with the words: "An attempt was then made by the officers of said Bank, with the consent and assistance of said Commissioner of Banking," defendant is not informed and has exhausted all [fol. 37] reliable sources of knowledge which are open to him for the purpose of determining the truthfulness of the said averments if said averments are material to this issue, he demands proof of each and every of them.

12. Deponent is not informed as to the calling together of the Executive Officers and Board of Trustees of plaintiff Union especially for the occasion, except that deponent is informed that a meeting of such Officers was held on or about April 4, 1924 at Johnstown to which meeting—al-

though deponent was one of the Executive Officers of the plaintiff Union—he was not invited and from participation in which he was barred. Deponent is informed and believes and expects to be able to prove upon the trial of this cause that no information was given to his surety concerning the action of said meeting except that late on the night of Saturday, April 5th or Sunday, April 6, 1924, a call was made by telephone upon certain employees of said surety in the City of Pittsburgh, who, however, were not Executive Officers nor authorized or empowered to accept such notice or take any action thereon in behalf of said surety. Deponent denies that said Peoples State Bank would have been forced into immediate liquidation by action of plaintiff Union and that plaintiff Union would have suffered a loss thereupon of $150,000.00 or more of its deposits, and deponent avers that whatever agreement was made and entered into by and between the plaintiff Union and the United States Trust Company was made and entered into without his knowledge, consent or acquiescence; without [fol. 38] any opportunity to him to be heard in his own behalf and to the prejudice of deponent's rights and his great damage in the premises.

The deponent avers that he had already tendered his resignation to plaintiff Union; that said resignation had been refused and that subsequently without any opportunity for him to be heard in his own behalf and to the prejudice of the rights of the deponent, he received notice of dismissal from said office of Treasurer from plaintiff Union; that said dismissal so had was without just cause and greatly to the damage of this deponent.

Deponent further says that the agreement made between plaintiff Union and the United States Trust Company, if as averred in the amended statement of claim, was unnecessary, unfair and in prejudice of the rights of deponent and his surety and without the knowledge, consent or acquiescence of either of them.

13. Defendant denies the averments of paragraph "13" of the amended statement of claim and avers that the agreement recited therein was voluntarily entered into by plaintiff; that said agreement was to the disadvantage of the plaintiff and unnecessarily so; that any loss sustained by plaintiff was through the action of its own Supreme As-

sembly and Officers in entering into said agreement and through no fault or failure on the part of the deponent as Treasurer.

14. Defendant denies the averments of paragraph "14" of the amended statement of claim and especially that the expenses of the special session of Supreme Officers of plain-
[fol. 39] tiff constituting a Board of Trustees and Supreme Assembly are chargeable in anywise or for any reason against this defendant and further denies that said costs and expenses are pecuniary loss to plaintiff by any default on the part of defendant as Treasurer.

15. Defendant admits that plaintiff placed in his hands as Treasurer, certain sums which were benefits payable to beneficiaries residing in Europe and that it was his duty to remit said sum to the proper beneficiaries and to obtain and return receipts therefore, as set forth in the first section of paragraph "15" of the amended statement of claim. Defendant denies, however, that he had not made return of receipts in the sum of $4950.16 or in any other sum and denies that plaintiff will sustain any pecuniary loss thereby for which defendant or his surety is liable, and for further answer to the averments of said paragraph, defendant says that at all times in every instance where monies were placed in his hands as Treasurer as set forth in said paragraph "15," he promptly forwarded said funds by the usual course of mail or express, as the case might be, to the parties entitled to receive them and he is informed and believes and expects to be able to prove at the trial of this cause, that all of the funds placed in his hands as aforesaid, have been duly accounted for.

16. The averments of paragraph "16" so far as these refer to demand upon defendant for the sums of money set forth in the statement of claim and that defendant has not complied with such demand are admitted but defendant denies again that any losses were sustained by the plaintiff [fol. 40] through this defendant's fault or failure to perform faithfully the duties of his said office of Treasurer.

17. For further answer to plaintiff's claim as set forth in its amended statement filed, defendant avers

(a) That during the several terms of his Treasurership of plaintiff Union, it was necessary to keep on hand in

checking accounts, large sums of money. That during part of said time and up until about the first of the year 1924, plaintiff Union was building and completing an Orphanage for payments on account of which, large sums were required to be made. That for several years prior to 1924, sums equal to or in excess of those on deposit in the Peoples State Bank in the months of January, February and March of 1924 were on deposit in the Peoples State Bank of Johnstown and that on at least one occasion, defendant had stated to the Supreme Assembly of plaintiff that there was too much money kept in one bank.

(b) Defendant was a member of the Supreme Assembly of plaintiff Union and attended the various meetings of the Assembly which were generally held a month or six weeks apart and that at all other times as required, defendant kept the Supreme Assembly of plaintiff fully informed as to all funds in his hands and where said funds were deposited or how they were invested. That this information was necessary in order to permit the Supreme Assembly to indicate the investment or other disposition [fol. 41] of said funds. That the supervision and control of said funds was entirely within the hands of the Supreme Assembly; that defendant was without power to withdraw one cent or change the deposit of any amount except upon check or written order drawn and signed by the Financial Secretary, countersigned by the President and delivered to him, the Treasurer.

(c) Defendant denies that Peoples State Bank of Johnstown was unsafe as set forth in plaintiff's amended statement of claim and denies that he had any reason to believe that said bank was unsafe or until the day when checks of plaintiff Union in the amount of $89,000.00 were presented at said bank as set forth in paragraph "11," that said checks would not be paid. Defendant avers that he found on investigation at said time that said Peoples State Bank held the large amount of negotiable paper and securities upon which it could not immediately realize cash but that except for the unfortunate situation which arose upon the presentation of said checks, said bank would have been able to meet its obligations.

(d) Defendant denies that there was any breach on his part of any of the obligations which he as Treasurer of

plaintiff, sustained to the plaintiff and avers on the contrary, that throughout his several terms of office, he conducted himself and said office in all good faith and with entire fidelity to plaintiff. That the situation with regard to said Peoples State Bank and its dishonoring of the $89,000.00 checks presented to it for payment was one for which defendant was in nowise responsible, could not have [fol. 42] prevented and of which defendant had no knowledge nor chargeable with knowledge in time to prevent the dishonoring of the checks and the consequent embarrassment.

18. Defendant avers by way of counterclaim that plaintiff is indebted to him for his salary as Treasurer at the rate of $100.00 per month for 9 months ending March 31, 1924 and for the further sum of $134.86 expended by defendant from his own funds for traveling expenses, stamps and miscellaneous, the full and true statement whereof has heretofore been furnished plaintiff together with demand for payment thereof which demand has been refused and said amount is now justly due and owing by plaintiff to defendant.

All of which is correct and true as defendant verily believes and expects to be able to prove upon the trial of this cause.

George Kondor.

Sworn to and subscribed before me this 26th day of June, 1928. My commission expires April 1, 1931. Rhea V. Spotz, Notary Public. (Seal.)

[fol. 43] In United States District Court

Defendants' Bill of Exceptions—Filed January 21, 1931

Caption

Be it remembered that the plaintiff above-named, The Greek Catholic Union, a corporation under the laws of the State of Pennsylvania, having brought an action of assumpsit against the defendant, American Surety Company of New York, a corporation under the laws of the State of

New York, in the Court of Common Pleas of Allegheny County, State of Pennsylvania in said Western District of Pennsylvania, said cause was removed into the District Court of the United States for the Western District of Pennsylvania and George Kondor, impleaded as a co-defendant therein; plaintiff filed a Statement of Claim to which Affidavits of Defense were filed by the respective defendants and thereupon issues were joined between them and afterward, to-wit, at the regular May Term of said District Court at a session held before the Hon. Robert M. Gibson, one of the judges of Court on May 6th, 1930, the issues raised as aforesaid came on to be heard before said judge and a jury.

APPEARANCES OF COUNSEL

Ralph C. Davis, Esq., T. S. & O. W. Brown, Esqs., for the Plaintiff.

James M. Magee, Esq., Edmund W. Arthur, Esq., for the Defendant American Surety Company of New York.

[fol. 44] Robert C. Hoerle, Esq., for the Defendant George Kondor.

Whereupon the following proceedings were had:

TESTIMONY

Mr. Davis addressed the Jury in opening.

Mr. Davis: Plaintiff offers in evidence those parts of the Statement of Claim either admitted or undenied by the Affidavit of Defense as follows:

1. The plaintiff is a corporation, duly incorporated under the laws of the State of Pennsylvania, and having its principal place of business at the Borough of Munhall (Homestead Post Office) in the County of Allegheny in said State; and its business is that of a Beneficial Society, which pays certain sums of money, to its members, as benefits, in case of death or disablement.

2. The defendant, American Surety Company, of New York is a corporation under the laws of the State of New York, and registered and licensed to do business in the

State of Pennsylvania, and is engaged in the business of a Bonding or Surety Company, insuring, in consideration of compensation paid to it, the fidelity of persons holding positions of trust and responsibility in organizations such as the plaintiff and others.

3. The business of the plaintiff is conducted by its officers: among whom is one called the Treasurer (also called and known as the Supreme Treasurer), whose powers, [fol. 45] duties and responsibilities are defined and prescribed by the By-laws of the plaintiff corporation, as provided and ordained by Article 7, Section 32 of said By-laws adopted by said corporation, June 17, 1922, which By-laws were those in force and governing the Treasurer and his office, during the period hereinafter mentioned and referred to; a true and correct copy of said By-laws is hereto attached and made part hereof, marked "Exhibit A."

I am offering "Exhibit A." (Reads:)

EXHIBIT "A"

Article 7—Section 32

Treasurer and His Duties.—

(1) The Treasurer of the Union receive- all moneys sent to him by the various subordinate lodges.

(2) Pays all checks drawn and signed by the Financial Secretary and signed by the President of the Union.

(3) He keeps regular books of account showing all receipts and disbursements of the Union..

(4) At the end of each month, he makes a financial report showing all receipts and disbursements and sends the same to the Supreme Assembly of the Greek Catholic Union of Rusin Brotherhoods to the convention or yearly meeting.

(5) He also submits a statement of all cashed checks monthly to the President of Supreme Auditors and a correct sworn report of financial standing of Greek Catholic [fol. 46] Union of Rusin Brotherhoods to the convention or yearly meeting.

(6) If the Treasurer has any doubt as to the validity of any checks the matter must be submitted to the President

of the Auditors and, if the latter decides that such checks shall be paid, he must pay the same but he shall note in the book of disbursement: "paid by the order of the President of the Auditors."

(7) The Treasurer is not allowed to carry more than $25,000.00 on a checking account over and above amount necessary for the payment of the death benefits monthly. All surplus funds above those amounts shall be deposited in interest bearing deposits with safe banks or invested in safe and legal bonds, according to the discretion of the Supreme Assembly from time to time. All such deposits and investments to be made in the name of the Greek Catholic Union of U. S. A.

(8) The Treasurer also receives all money from death benefits of members which is owing to minor children, beneficiaries of deceased members, for whom no legal guardian have been duly appointed and certified to the Supreme Assembly, and to him the Financial Secretary shall assign all such benefits.

(9) The Treasurer shall keep a record of all orphans' moneys received by him and shall keep a record of each transaction on a separate page as follows:
[fol. 47] Provision of deceased member.
Names of the orphans and their ages, also the amount due each orphan from the death benefit of their deceased parents, or relative.

(10) The Treasurer shall deposit all orphans' money in interest bearing reliable banks, bearing 4 per cent interest, such deposits not to exceed $10,000 in one bank. As soon as he shall receive same from the Treasurer of the Greek Catholic Union of Rusin Brotherhoods, and of this inform the Financial Secretary and the President of the Auditors and the Secretary shall inform the Local Assembly. to which the deceased member belonged.

(11) The Treasurer is obliged to take care of orphans' money until such time as they shall have a guardian appointed as provided by law.

(12) If at any time after such funds have come into the hands of the Treasurer, a legal guardian is duly appointed to the minors to whom they belong, and such appointment

duly certified to the Supreme Assembly, the Treasurer shall pay to said guardian the funds to which said orphan or orphans are entitled.

(13) The funds of orphans residing in any other countries than the United States of America are to be governed by the same regulations, except so far as the laws of the United States require otherwise in which case the [fol. 48] laws of the United States must be observed by the Treasurer and by all other officers of the Union.

(14) If a beneficiary has reached the age of maturity and desires to withdraw his or her funds from the Treasury documentary proof or certificate of birth, and if married shall also attach certificate of such marriage, which certificate must be mailed to the Financial Secretary of the Union, who shall notify the Treasurer and thereby release the fund in his hands.

(15) If the orphans reside in any other country than U. S. A. and request that the benefits due to them be sent to them if the Law of the U. S. A. permits; they must comply with the requirements of these By-laws and all documents required must be attested by a consulate of the U. S. A. in the country where such orphans reside. In case where the claim does not exceed $100.00, the necessary documents authenticated by church authorities of the respective district will suffice.

(16) If moneys remitted by the Treasurer should be lost, he shall be liable and must reimburse either the orphans or the Treasury of the Greek Catholic Union.

(17) The Treasurer is required to keep all receipts for benefits and other documents together and in a safe place and within three months after receiving same he presents them for audit to the Auditors of the Greek Catholic Union.

[fol. 49] (18) If the Treasurer should pay out any money on improper documents and the Greek Catholic Union of Rusin Brotherhoods should be compelled to pay any money over again, the Treasurer with the President and Financial Secretary shall be responsible for such amount to the Greek Catholic Union and refund such amount to the Treasury of the Greek Catholic Union.

(19) All documents in care of the Treasurer shall be submitted to the President or Secretary of the Union if requested, for which he shall receive a receipt.

(20) It shall be the duty of the Treasurer to publish each month in the official organ a statement of all orphans' moneys received and all payments made by him, specifying the individuals for whose benefit he has received such funds, and to whom he has made payments, and also stating the total of orphans' funds remaining in his hands as such Treasurer.

(21) He must be able to read and write Rusin, Slavic and English and must be a citizen of the United States of America.

(22) He signs checks with the President and Financial Secretary.

(23) The Treasurer shall receive a salary of $1200.00 per year, viz: $600.00 from the General Branch; $300.00 from the Youths' Branch; and $300.00 from the Gymnastic Branch, and is to provide a "C" Bond for $100,000.00."

[fol. 50] That part of paragraph four undenied as follows (reads):

4. During the years 1920, 1921, 1922, 1923 and the months of January, February and March 1924, the Treasurer of the plaintiff was said defendant, George Kondor, who held said office by virtue of due and proper election and reelection thereto, by the General Conventions of the plaintiff; and he so continued to hold and occupy said office until April, 1924.

Also paragraph five (reads):

"5. By the provisions of said By-laws, Article 7, Section 32, paragraph 23, the Treasurer is required to furnish a surety bond, for the faithful discharge of his duties as such officer, in the sum of $100,000.00, as will appear on reference to said 'Exhibit A,' and hereto attached.":

Also paragraph six (reads):

"6. In compliance with the above mentioned requirement for a surety bond, said Treasurer procured the de-

fendant, the American Surety Company of New York, to so become his surety; and said defendant, for and in consideration of a cash premium paid to it for that purpose by the plaintiff, made and entered into a contract, or bond of surety, with the plaintiff, original dated July 19, 1920, and by payment of annual premiums renewed from year to year, including the year ending July 20th, 1924, [fol. 51] whereby it insured to the plaintiff the fidelity of said George Kondor in the discharge of his duties as such Treasurer of said corporation, the plaintiff, during his incumbency of that office; and by the terms of said bond, or contract, said defendant became bound to reimburse and pay to the plaintiff any and all pecuniary loss which it should sustain by reason of any default or failure by said George Kondor, in the discharge of his duties as such Treasurer, as prescribed and required by said By-laws of the plaintiff; or through his failure to keep intact and absolutely to account for all funds of the plaintiff, as prescribed by said By-laws; or through the failure of any bank in which he deposited the funds of the plaintiff. Said bond, or contract, is of the type or kind known as a 'Schedule Bond,' and designated as a 'C' Bond, and is the kind of bond required by said By-laws to be furnished by the Treasurer. It includes both the offices of Manager and Treasurer; and the liability of the surety for defaults of the Treasuer is therein fixed and specified as not to exceed the sum of $100,000.00. A true and correct copy of said bond, or contract, is hereto attached and made part hereof, marked 'Exhibit C.' "

[fol. 52] EXHIBIT "C"

I offer "Exhibit C" as follows (reads):

American Surety Company of New York

Capital $5,000,000.00

Schedule Bond

The American Surety Company of New York, as Surety for the officers and employees of The Greek Catholic Union of U. S. A., Homestead, Penn'a (hereinafter called the

"Order"), whose position with the amount of surety for each are specified in the schedule attached to and hereby make a part of this bond, binds itself to pay said Order such pecuniary loss as it shall have sustained of money, funds, securities or other personal property, including that for which the Order is responsible.

(a) through Fraud, Dishonesty, Forgery, Theft, Embezzlement, Wrongful Abstraction or Wilful Misapplication on the part of any such officer or employe, directly or through connivance with others,

(b) or through the failure of any such officer or employe faithfully to perform his (or her) duties as prescribed by the Constitution and By-laws of said Order.

(c) or through the failure of any such officer or employe to keep intact and absolutely to account for all funds of the Order in accordance with said Constitution and by-laws;

(d) or through the failure of any bank or trust company [fol. 53] wherein are deposited funds for which any such officer or employe is responsible to the Order. In case of such loss, the liability of the Surety shall not exceed the amount of the suretyship hereunder for the officer or employe directly charged with responsibility for the funds.

In no event shall the liability of the Surety for any officer or employe under any or all of the foregoing conditions in the aggregate exceed the amount specified in said schedule for such officer or employe. The Suretyship for each officer and employe shall begin with the date set opposite the position of such officer or employe in said schedule and end, (a) with the date of the discovery by the Order either of loss thereunder or of dishonesty on the part of the officer or employe, or (b) with the date of the retirement of the officer or employe from the service of the Order, or (c) with the date of the termination of the suretyship by the Surety or the Order in the manner hereinafter set forth in clause 7.

Provided further:

1. That loss under the suretyship hereunder for any officer or employe be discovered during the incumbency of such officer or employe or within the fifteen months immediately following the termination thereof, and that notice

of such loss be delivered to the Surety at its home office in the City of New York within ten days after such discovery.

[fol. 54] 2. That claim, if any, be submitted by the Order in writing, showing the items and the dates of the losses, and be delivered to the Surety at its home office within three months after such discovery, and that the Surety shall have two months after claim has been represented in which to verify and to make payment. In the menatime no suit, action or proceeding shall be brought against the Surety by the Order in respect to such claim, nor after the expiration of twelve months after the delivery of such statement of claim. In any suit, action or proceeding the office or employe shall, if with reasonable diligence he can be found within the jurisdiction, be made a party to the suit and served with process therein.

3. That in no event shall the liability of the Surety for any one or more defaults of any officer or employe during any one or more years of the suretyship for such officer or employe exceed the amount specified in said schedule for such officer or employe.

4. That the Surety shall not be liable hereunder for any default the proceeds of which shall have been applied to the payment to the Order of a pre-existing debt.

5. That in the event that the loss under any suretyship hereunder exceeds the amount of such suretyship, the Order and the Surety shall share with each other pro rata in any net recovery, except recovery upon or from other surety-[fol. 55] ship, in the proportion that the amount of the payment under the suretyship bears to the total shortage.

6. That the amount of suretyship covering any position may, or written application of the Order, be increased or decreased by the Surety without impairing the continuity thereof.

7. That this bond or any suretyship hereunder may be terminated by the Surety upon thirty days' notice to the Order, or by the Order upon notice in writing to the Surety specifying the date of termination. Thereupon the Surety shall refund the unearned premium for such suretyship if no claim has been paid thereunder.

8. That to any position mentioned in the schedule hereinbefore referred to in line four, the Order may from time to time elect or appoint an officer or employe other than the incumbent at the time of the issuance of this bond, without notice to the Surety, and, unless the Surety has paid a loss under the suretyship for his predecessor, without the payment of additional premium during the bond year.

9. That when suretyship is desired in connection with other positions than those named in said schedule, the Order shall make written application for such suretyship, specifying the positions and locations with the amount and the date of the commencement of the suretyship required [fol. 56] for each. Thereupon if satisfactory to it, the Surety shall become bound under the terms of this bond for such suretyship, notice in writing to that effect to be given the Order by the Surety, and such notice to be attached to and made a part of said schedule.

In Witness Whereof the Surety has set its hand and seal this 19th day of July, 1920.

American Surety Company of New York, by F. W. Lafrentz, President. A. C. McDonald, Resident Assistant Secretary at Pittsburgh, Pennsylvania.

It is further understood and agreed that the officers whose guarantees exceed Fifteen Hundred ($1500) Dollars each in amount shall furnish the Surety with complete applications and have their names, positions, locations and the amounts of their respective guarantees specified in the acceptance attached to this bond or added thereto. This applies to those officers originally covered by this bond to their successors and to new officers elected or appointed to positions.

Dated at Pittsburgh, Penn'a this 19th day of July, A. D. 1920.

American Surety Company of New York, by R. E. Benham, Resident Vice-President. Attest: A. C. [fol. 57] McDonald, Resident Asst. Sec. (Seal.)
For the Order: By Michael Yuhasz, Sr., President.

Suretyship Bond of the American Surety Co. of New York, on behalf of officers in favor of Greek Catholic Union of U. S. A. Homestead, Pa., Pittsburgh, Pa. No. 5938. $110,000.00.

Copy

Form F. 606, 10M.
(F 15 Fraternal Continuous Schedule Subordinate Officers.)

Company's Office Building, 100 Broadway, N. Y.

Notice of Acceptance

American Surety Company of New York, Branch Office at Pittsburgh, Penn'a

Dated July 19, 1920

The Greek Catholic Union of U. S. A., Homestead, Pennsylvania

Subject to the conditions of this Company's Schedule Fidelity Bond now in force in your favor, liability is [fol. 58] hereby assumed on behalf of the Officials occupying the positions stated below, in the amounts and from the dates herein specified.

American Surety Company of New York, by F. W. Lafrentz, President. (Seal.) A. C. McDonald, Resident Assistant Secretary.

No. 377,471A. Date: 7/1/20.

Principal	Position	Location	Amt.	Prem.
Michael J. Yuhasz....	Manager.....	Homestead.....	$10,000	$50
George Kondor.....	Treasurer.....	" Pa.....	100,000	500

Also a portion of paragraph eight as follows:

8. It is prescribed and required by said By-laws—Article 7, Section 32, paragraph (7)—as by reference to said "Exhibit A" will appear, that said Treasurer is forbidden to carry on checking account in bank, of the funds of the plaintiff, a sum more than $25,000.00 beyond the amount needed for monthly payment of death benefits. And all funds of the plaintiff, over and above the said limited amount, he must deposit in interest bearing deposits with "safe Banks"; or keep invested in bonds at the direction and in the discretion of the Supreme Assembly of the plaintiff."

Also paragraph sixteen as follows (reads):

"16. The plaintiff has demanded payment from said [fol. 59] George Kondor of the several sums of money above set forth and stated, as losses sustained by it through his default and failure to faithfully perform the duties of his said office of Treasurer, but he has hitherto——"

Mr. Arthur: The demand is all that is admitted. We deny it except the demand.

Mr. Davis: All right, it admits that the demand was made. We offer the paragraph as follows (reads):

"The plaintiff has, likewise, made demand of the defendant, the American Surety Company of New York, a surety for said George Kondor, as aforesaid, for payment of said several sums of money, as aforesaid lost by it, and for which said surety is liable, but said defendant has hitherto wholly neglected and refused to pay the same or any part thereof.

Harry J. Phillips, a witness produced on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

Mr. Davis:

Q. Where do you live, Mr. Phillips?

A. 102 Grant avenue, Etna.

Q. Will you speak out so the Jury can hear? And where were you living in 1924?

A. The Borough of Etna, a different street address.

[fol. 60] Q. What was your occupation along about the first of January and until the first of April, 1924?

A. State Bank Examiner.

Q. For what state?

A. Pennsylvania.

Q. And where are the offices of the State Bank Examiner?

A. Harrisburg.

Q. That is at the Capitol?

A. At the Capitol.

Q. And how long had you been the State Bank Examiner?

A. In 1924?

Q. Yes.

A. A little more than eight years. I was appointed and began my work in the month of April 1916.

Q. Prior to your appointment as State Bank Examiner had you had experience in banks?

A. In an accounting way, yes, sir.

Q. With what banks were you connected?

A. Not employed by any direct bank, but doing auditing for banks as well as other corporations.

Q. What is your occupation now?

A. Private bank accounting, specializing in analyses and system work, very similar to the work of the bank examiner, only specializing in the accounting feature.

Q. From and since 1915 you have been a bank examiner or actively engaged in the banking business?

A. Steadily.

Q. Do you know, or rather did you know in 1924 or prior [fol. 61] thereto of the Peoples State Bank at Johnstown, Pennsylvania?

A. I did.

Q. Had you been in or examined the Peoples State Bank?

A. I examined the Peoples State Bank as of the date of January 15, 1924, and that was possibly the second or third examination of the Institution I had made in other years. I think that was possibly the third examination that I had made of that Institution, January 15, 1924.

Q. Were you in Johnstown at that time?

A. January 1924?

Q. Yes.

A. I was.

Q. How long did you stay in Johnstown then, or in that neighborhood?

A. Do you mean at that particular week, that particular examination?

Q. Well, from that time on?

A. Much of my work during the period of three or four days was in Cambria County. During that period of three days I visited every state bank in Cambria County, something like thirty-two in number, and the January visit I would say at that examination possibly lasted a week—four or five days or a week, after which I returned to the Pittsburgh office to prepare the report of examination to be filed at Harrisburg.

Q. And on that report, do you remember the date of your report?

A. I wrote two reports as of the January 15th examination, I recall, because of the nature or the result of my examination; I saw fit to file a preliminary report I would [fol. 62] say as of date about January 20th or 21st, and then the regular report more complete in detail some few days later, but the preliminary really was for the purpose—that was in accordance with the practice—the importance of calling the attention of the Banking Department to certain conditions regarding which I thought they should be advised, so there were two reports of the January 15th examination.

(Marked plaintiff's exhibit "A" and plaintiff's exhibit "B").

Q. I show you plaintiff's exhibit "A" and ask you what that is?

A. This is my preliminary report of my examination as of date of January 15th, a copy.

Q. And what is the date of that report?

A. January 21, 1924.

Q. I show you exhibit "B" and ask you what that is?

A. This is a photostat copy of my complete or final report for the Department of Banking, covering the examination as of January 15, 1924.

Mr. Davis: Plaintiff offers in evidence plaintiff's exhibit "A" and exhibit "B".

Mr. Arthur: Objected to as incompetent, irrelevant and immaterial; incompetent for the reason that these do not purport to be originals, but simply copies of reports, and for the further reason that they contain not simply a statement of the bank's business, but comments written into [fol. 63] them by the Examiner and statements of conclusions and matters of opinion.

Mr. Davis: If your Honor please, in meeting that, we had a stipulation signed by counsel for both sides, providing that instead of bringing these original records on from Harrisburg, it was agreed "That with respect to the financial condition of said Peoples State Bank of Johnstown, Pa., at the end of the month of March, 1924, the statements, schedules of assets and liabilities and balance sheets pre-

pared for the State Bank Examiner upon the examination of said bank at that time, or duly authenticated copies thereof may be admitted in evidence, without the production of the original books, documents, papers and memoranda from which the same were prepared." Instead of that we have the duly authenticated copies identified by the man that made them.

Mr. Arthur: Further speaking for counsel for the Surety Company, the stipulation provides for the admission of statements, schedules of assets and liabilities and balance sheets showing the financial statement at the end of the month of March 1924, and this is January 15, 1924.

Mr. Davis: We will follow that with evidence showing that that is practically the same; there was no other examination made, no other report made.

[fol. 64] The Court: Followed by testimony that they were the same?

Mr. Davis: Substantially the same.

The Court: What is the purpose of the introduction of the records? What is the ultimate purpose?

Mr. Davis: The ultimate purpose is to show the condition of the bank.

The Court: That is other than the mere closing out of the transfer?

Mr. Davis: Yes, the full condition of the facts referring to that, and also the statement of the Bank Examiner as to his conclusions drawn from those facts which are presented here.

The Court: I will overrule the objection and note an exception.

Mr. Davis: I will read exhibit "A" (reads):

EXHIBIT "A"

"Etna, Pa., January 21, 1924.

Hon. Peter G. Cameron, Secretary of Banking, Harrisburg, Penna.

DEAR SIR: I beg to submit herewith the following information pertaining to the condition of the Peoples State Bank of Johnstown, Pa., the same having been revealed as [fol. 65] the result of an examination of that institution as of the close of business on January 15, 1924.

For the purpose of this report, attention will be called to various matters of importance, several of which appear to be serious enough to suggest the thought that there is at least a danger that this Bank might at some early date be unable to meet its demand obligations, unless successful efforts are promptly made to correct certain existing conditions.

Reserve (on Date of Examination)

Amount required:		
Demand liabilities	$31,674.71	
Time liabilities	12,597.83	
		$44,272.54
Amount carried		23,243.99
Amount short		$21,028.55

Cash Reserve—Short $3,875.79.

The deficits in Reserve were caused as the result of the payment of this Bank on January 15th of an unusually large amount of checks, the same being drawn against the following deposit accounts:

Greek Catholic Union	$30,639.16
Various	1,955.29
Total	$32,594.45

The Reserve Fund was restored to an amount in excess of legal requirements during examination through the rediscounting of two notes of the Borough of Franklin, aggre- [fol. 66] gating $32,800.00, at the Colonial Trust Company of Pittsburgh, Pa. In this connection, mention is made that the notes referred to were only placed on the Bank's records as assets on January 15th, although these loans appear to have been previously arranged for by the Borough of Franklin for the purpose of establishing a Sinking Fund. An amount of $32,800.00 was placed to the credit of the borrower in a deposit account opened in the Bank's Savings Ledger. These two loans and one for $15,000.00 previously made, represent a total amount of $47,800.00 which is now loaned by this Bank to the Borough of Franklin. Ten per cent of this Bank's combined Capital and Sur-

plus amounts to $6,250.00. The Borough of Franklin loans, while probably safe enough, are largely excessive according to the ruling of the Department.

Although the Reserve Fund deficits were promptly taken care of in the manner described, it appears quite certain that this Bank will experience considerable difficulty in the near future in maintaining a sufficient amount of reserve, inasmuch as it is now known that it will be called upon during that time to take care of certain large withdrawals of deposits. In this connection importance is attached to the fact that an excessively large percentage of this Bank's demand deposits is represented by a very small number of accounts, a condition which is extremely dangerous in view of the non-liquid condition of the Bank's assets. Both of these matters will be later referred to.

[fol. 67] Distribution of Demand Deposits

Greek Catholic Union (5 accts.)		$126,068.11
Franklin Borough School District	$31,178.18	
Commonwealth of Penna.	10,000.00	
L. Larimer, County Treasurer	5,000.00	
Johnstown School District	4,804.44	
W. E. Smith, Treas. Franklin Boro.	3,000.00	
		53,982.62
Various other deposit accounts		30,607.62
Total		210,658.35

As shown by the above recapitulation, the Greek Catholic Union accounts on date of examination represented an amount equal to approximately 60% of the Bank's total amount of deposits. The Commonwealth and four Municipal accounts represented a total amount equal to about 25% of the Bank's total amount of deposits.

Although the unexpected withdrawal at this time of any large part of the several accounts represented in the above recapitulation by the total amount of $54,982.62 would undoubtedly cause this institution considerable worry and annoyance, particular importance is here attached to the accounts of the Greek Catholic Union.

The Greek Catholic Union is a fraternal insurance society having approximately 2,000 branches or lodges located in various parts of the United States. Mr. Geo.

Kondor, its Treasurer, is the President of the Bank under [fol. 68] examination. The office of the Secretary of the Greek Catholic Union, Mr. George Komlos, is located in Homestead, Pa.

Deposits made to the Greek Catholic Union accounts by its various branches, the same being mailed direct to Mr. Kondor in care of this Bank, have been averaging about $60,000.00 per month.

Disbursements are made by checks prepared at the office of the Secretary. These checks, after being properly signed by the Secretary and President, are forwarded to Mr. Kondor for his signature as Treasurer, by whom same are then mailed out to the various parties in whose favor the checks are drawn.

Before leaving this institution your examiner learned from Mr. Kondor that he at that time had in his possession sundry checks drawn by the Greek Catholic Union aggregating approximately $35,000.00 which he would be obliged to sign and mail out without any great delay. These included one check for a little more than $14,000.00 and represented the cost of bonds purchased from the Union Trust Company of Pittsburgh. It was received by Mr. Kondor on the morning of January 18th, the same having been sent by Special Delivery mail. The various other items had already been held by him for several days.

It would appear, therefore, that this Bank will be called upon to pay at least $35,000.00 of Greek Catholic Union checks some time during the next week or ten days. While deposits are likely to be made to the same accounts from time to time during the period referred to, their total amount cannot be now determined.

[fol. 69] During the two weeks period ending January 15th, the Demand Deposit balances carried by the Greek Catholic Union in this Bank were reduced a total net amount of approximately $65,000.00. In view of this condition the further withdrawal of $35,000.00, represented by checks not yet presented to the Bank for payment, arouses a suspicion that there might be some important reason for the large withdrawals of deposits which have been made since the first of the year and that same are likely to continue.

In connection with the affairs of the Greek Catholic Union, attention is here called to the fact that Mr. Kondor's

term as Treasurer of same expires during the month of June, this year. The election of a new Treasurer, a condition which rather appears to be anticipated by Mr. Kondor, would undoubtedly result in an early removal of the deposit accounts now carried by the Greek Catholic Union in this institution.

In view of the above, it appears to be extremely important that this Bank should immediately commence to prepare to be in a safe condition to permit of the removal of the total amount of Greek Catholic Union deposits if, and when, it is called upon to pay same.

Distribution of Savings Deposits

Greek Catholic Union	$52,976.79
Borough of Franklin	32,800.00
Sundry accounts, (3)	13,119.64
Various accounts	69,074.78
Total	$167,971.11

[fol. 70] Condensed Statement of Assets and Liabilities

Assets:

Cash on hand and in Banks		$32,870.92	
Loans and Discounts		309,771.60	
Investment Securities		49,517.50	
Office Bldg. & Lot	$20,000		
Other Real Estate	29,786		
Furniture & Fixtures	5,159.46		
		54,945.46	
Miscellaneous		683.77	
Deficit in Earnings		3,846.59	
			451,635.84

Liabilities:

Capital Stock	50,000.00	
Surplus	12,500.00	
Demand Certificates of Dep.	506.38	
Demand Deposits	210,658.35	
Savings Deposits	167,971.11	
Mortgage	10,000.00	
		451,635.84

Items classified as Slow Assets:

Various Loans & Discounts	170,000.00	
Sundry local & unlisted bonds	38,250.00	
Furniture & Fixtures (revised) & Real Estate	51,786.00	
Total		$260,036.00

[fol. 71] The largest and most important loans carried which are not classified as slow are those of the Borough of Franklin aggregating $47,800.00.

Slow Loans, represented by the amount of $170,000.00 in the above recapitulation of Assets which have been classified as slow, include the following large and important groups of loans:

John H. Cooney	$47,176.00
George Kondor	13,900.00
John Cooney & Geo. Kondor	14,500.00
Navy Smokeless Coal Company	26,598.30
H. C. Cook Coal Companies	16,705.00
Eph. J. Custer Estate	4,000.00
T. Stanton Davis	7,750.00
A. W. Kernak	4,430.00
John Kosty	4,100.00

The amount of $170,000.00 as arrived at for the purpose of this report does not include any loans in connection with which losses will be appraised at this time. It is thought that $25,000.00, an amount equal to about 15% of $170,000.00, might properly be regarded as representing the amount of slow loans which would be also considered as doubtful.

As is indicated by the above figures, this Bank is in a very non-liquid condition.

Earnings.—During the year 1923 the total amount charged to Expense account exceeded the total amount credited to Earnings by an amount of approximately $4,150.00. This Bank pays interest on a large percentage of its total demand deposits and is at present receiving no earnings from its Foreign Department. Both of these con- [fol. 72] ditions are largely responsible for the fact that the Bank is being operated at a loss.

Appraisement

Surplus		$12,500.00
Less items appraised as losses:		
Deficit in Earnings, as per General Ledger accounts	$3,846.59	
Over & Short account debt balance	2.54	
Cash item	100.00	
Foreign Department item	254.38	
Overdraft	326.85	
W. Beabes—Wm. R. Fry	3,300.00	
R. L. Coleman—Wm. R. Fry	2,325.00	
Purity Drug Co.—Wm. R. Fry & Edw. Custer	4,950.00	
W. E. Wissinger—Wm. R. Fry	500.00	
Jos. Seman	3,680.00	
Jos. Woykoczky	2,015.00	
John Matta	2,000.00	
Est. loss—Furniture & Fixtures	1,659.46	
Est. loss—Other Real Estate	1,500.00	
Depreciation—Investment Securities	6,455.00	
Estimated amount of interest due on Savings Deposits	1,800.00	
		34,714.82
Impairment of Capital		22,214.82

Directors Loans—Large excessive.

A complete detailed report of this examination will be prepared and forwarded promptly.

[fol. 73] In conclusion would state that the Cashier of this Bank, Mr. E. R. Cherry, promised to keep your examiner informed of any new and important developments in the condition of its affairs.

Respectfully submitted.

(Signed) H. J. Phillips, Examiner."

I will read Exhibit "B".

(Reads exhibit "B" to the Jury.)

Mr. Arthur: If your Honor please, I wish to renew my objection in another form, and now move that this report

be stricken from the evidence as incompetent. By its own language it is indicated through and through in a multiplicity of places, as your Honor has no doubt noted where it is said "It is thought from what appears to be worthy information" "it appears" "he is known to be—" and so forth.

The Court: Motion overruled and an exception noted.

Recess until 1:30 o'clock P. M. this day.

[fol. 74] Afternoon Session

Tuesday, May 6, 1930.

HARRY J. PHILLIPS resumes the stand.

Direct examination.

Mr. Davis:

(Marked Plaintiff's Exhibit "C.")

Mr. Davis: As part of the record, if the Court please, I want to offer a stipulation entered into between Ralph C. Davis attorney for the plaintiff, and James M. Magee attorney for the defendant, in reference to this report which has just been read, as part of the record.

Mr. Arthur: If your Honor please, we have no objection to the offer of the stipulation, but we don't want to admit that it has reference to this paper that has been read.

The Court: The stipulation may go in.

Q. Mr. Phillips, do you know George Kondor?

A. I do.

Q. When did you first meet him, about when?

A. About 1920, 1918 to 1920.

Q. And how did you happen to meet him?

A. Through my official visits to the bank, The Peoples State Bank.

Q. And what did he have to do with the state bank?

A. He was president.

[fol. 75] Q. Was he familiar with the condition of that bank?

A. I would say yes.

Q. Why would you say that?

A. Because I personally discussed the affairs of the several examinations with him, not only as a director but as president; also because he was present at Harrisburg at hearings of the Board of Directors of that institution, at which time the affairs of the institution of course were discussed.

Q. Now, Mr. Phillips, your report that was read there was dated January 24, 1924, and referred to an examination of January 15, 1924. Were you in the bank around about the latter part of March to the first of April of 1924?

A. Following my examination of January 15th my next visit to the bank was at the date of March 4th, but that was purely on a matter of investigation to ascertain for the Banking Department the manner in which certain moneys had been paid into that bank to make good the amount promised, which is referred to in the report of January 15th. My next visit to the State Bank was on the morning of April 4th. I arrived in Johnstown on the evening of April 3rd, Thursday evening, accompanied by the Deputy Secretary of Banking, Mr. Graff of Harrisburg.

Q. And at that time did you again make an examination of the condition of the bank?

A. It was in the nature of an investigation, but for all practical purposes had operated as an examination. There was a reason for our being at the institution on that particular morning.

[fol. 76] Q. Just a minute, Mr. Phillips, before we get into that. From that examination on that morning was there much of a change, if any, between the condition of the bank as shown on your examination, your report of your examination of January 15th and when you made this examination?

A. There was no material change in the value of the assets as I recall it. The bank had succeeded in building up or bettering its position in respect to reserve. Their legal reserve had been restored, and that was the aim of the Banking Department to accomplish that result, but the assets of that bank were investigated on the morning of Friday April 4th, copies of all notes taken, copies of the different bond investment accounts, their cash counted and various other big amounts proved. These was no material betterment in the condition of their assets. In respect to

their deposit liabilities, the condition was even more hazardous in our opinion than it had been as of date of January 15th, because of not only large withdrawals that had taken place during that period, but the knowledge that we had of checks that were in Mr. Kondor's possession as of that morning, April 4th, which when signed by him and sent out to the parties in whose favor they were drawn, would likely be back to the bank in the course of the next couple days. On the morning of April 4th there were checks aggregating $89,000.00 that were forwarded to Mr. Kondor and held by him, which up to that moment had not been signed by him. In addition to the $89,000.00 of checks held by him and not mailed out I was able to establish the fact that there was $45,000.00 worth of checks——

[fol. 77] Q. When you say checks, which checks do you mean?

A. Greek Catholic Union checks which had been sent to Mr. Kondor for signature. At the time of the January 15th examination I instructed Mr. Cherry the cashier to keep me advised, as well as the Banking Department, as to the number and amount of checks that were coming in to Mr. Kondor's hands for signature. On March 31st there were a total of $104,000.00 worth of such checks sent to Mr. Kondor to be signed by him. $15,000.00 of that $104,000.00 were signed and had been mailed out, leaving the $89,000.00 that I had in mind that I referred to a moment ago. In other words there were $89,000.00 worth of checks prepared, drawn by the secretary, signed by the president and in Mr. Kondor's hands ready to be mailed out as soon as he signed them. Those certain checks aggregating $89,000.00, plus $45,000.00 which had been signed by him and mailed out, but which had not yet been back to the bank, made a total of $134,000.00 that I had knowledge of that were either in the air and would be back to that bank within possibly 48 or 72 hours, if not sooner. That is what prompted the making of this inventory of assets on Friday morning, April 4th, and that is when the meeting was had with the Directors of the Peoples State Bank; also a joint meeting with the Directors of the Greek Catholic Union, who happened or who were at the bank on that same day.

Q. Now, Mr. Phillips, supposing these checks for $89,000.00 had been presented that day, what would have happened?

[fol. 78] A. The funds were not there, the bank would have been closed.

Q. By whom?

A. By the State Banking Department. I had authority to close the bank. If those checks came in, the funds were not there, and this meeting was arranged for Friday afternoon, April 4th, with the Trustees of the Greek Catholic Union, a joint meeting between the Directors of the bank and the Greek Catholic Union Representatives and Mr. Graff and myself of the State Banking Department. It had been partially agreed, or at least understood prior to Friday afternoon——

Mr. Arthur: I object to a partial understanding.

The Court: Unless you give it in the shape of conversation, just what was said rather than the result?

A. With your permission I will put that in another way. I will say it was understood and agreed by the officers of the Greek Catholic Union and the officials of the bank that the $89,000.00 worth of checks would not be mailed out until after the meeting that I referred to had been held and such program satisfactorily worked out.

Q. Do you know Mr. Yuhasz, the president there?

A. I do.

Q. Did you meet him out there?

A. I did.

Q. And did you tell him practically what you have here said, that the bank would be closed if the $89,000.00 checks were presented?

[fol. 79] A. I told him in this way, realizing the condition of the bank, a movement had already been started by we two representatives of the Banking Department,—they had already taken the matter up with the other bankers of Johnstown. We realized, we well knew that unless some help was received from some stronger banking interests, this bank positively would have to close. Naturally we arranged or made every effort to prevent a forced closing. There are many reasons for our position in that matter. It affected the general banking condition in Cambria County. We interviewed the presidents of the three leading banks in Johnstown in the following order, the President of the United States National, the same party who was President of the United States Trust Company—they

are affiliated banks—the President of the Johnstown Trust Company, and the President of the First National Bank. In fact, the first meetings were had with those men on Thursday night after ten o'clock, prior to our visit to the bank on Friday morning. Those conferences were continued throughout Friday and all of Saturday. On Saturday morning Mr. David Barry, President of the First National Bank of Johnstown, President of the Johnstown Clearing House Association, called a meeting of all the member banks of the Johnstown Clearing House Association. Prior to that time the matter had only been discussed with the three presidents of these respective banks—but after this meeting on Saturday morning there were representatives of the various banks, possibly some eight or ten different banks. The matter was thoroughly [fol. 80] discussed, conditions as to the values of assets and how the thing could be best worked out, but those efforts were without any apparent success. Our conferences, however continued throughout Saturday evening, and on Sunday when the thing appeared to be all off, there was no hope of having a bank come to our rescue and take over our banks, we received a proposition from the United States——

Mr. Arthur: Just a moment, we object to this line of testimony because conferences with other banks in Johnstown could not possibly charge this defendant.

The Court: No, I think it is more material what information was imparted to the defendant in the first place.

Q. These various conferences, Mr. Phillips, that you have been describing, were participated in by the plaintiffs or their representatives and by the defendant George Kondor or his representative?

A. No, the conferences I am referred to were between the banking interests and the representatives of the State Banking Department.

Q. But afterwards there were conferences held with the representatives of the Greek Catholic Union. Let's get back to the question; we just want to get this as concise as we can without going into it too far. There were conferences between the representatives of the Greek Catholic [fol. 81] Union and the officers and directors of the Peoples Trust Company and the representatives of the

State Banking Department, which you and Mr. Graff were representing, together with the banking interests of Johnstown?

A. No, there were two sets of conferences. There were conferences between the Greek Catholic Union Trustees, the Directors of the Peoples State Bank and representatives of the State Banking Department, but the other conferences that I referred to as conferences, these meetings were between the representatives of the Banking Department and the banks of Johnstown.

Q. All right. Do you remember of sitting in the office of Mr. Stevens an attorney, on Saturday night?

A. I do.

Q. And who was present at that conference, if you remember?

A. Well, there was Mr. Stevens, Mr. Graff, yourself, myself, Mr. Yuhasz, Mr. Komlos and probably as many as five or six others of the Greek Catholic Trustees whose names I cannot recall.

Q. But there were other men there representing some of the other banking institutions of Johnstown at that conference?

A. Yes.

Q. Do you remember at that time going over the assets of the bank, that there was an estimate made as to what the probable recovery value would be?

A. Do you mean at the Saturday night meeting?

Q. Yes.

[fol. 82] A. I don't remember any figures being discussed on that, Mr. Davis. The general situation was discussed as to possibility.

Q. Do you remember of an estimate being made as to the probable amount that could be recovered at forced liquidation of the assets?

Mr. Arthur: Objected to; the defendants were not present. Who was Mr. Stevens?

A. Mr. Stevens was a Director of the Peoples State Bank.

Q. And do you remember whether Mr. Kondor was there?

A. Mr. Kondor was there, and Mr. Yuhasz.

Q. And there was at that time an estimate as to the

probable amount or percentage that might be recovered at forced liquidation of those assets?

A. Yes.

Q. Do you remember what that percentage was?

A. Well, the amount was—various estimates made at that time, about 40% I think is what I heard used.

Q. Then nothing came of that meeting all Saturday night?

A. Nothing.

Q. By the way, do you remember of a telephone call being made late at night?

A. Yes.

Q. By whom?

A. Yourself.

Q. To whom, do you remember?

A. To New York.

[fol. 83] Q. Do you remember to whom it was made?

A. No. The representative of a surety company official or officer, but the name I don't recall.

Q. You don't remember the name?

A. But I know a call was put in from Mr. Stevens' office, because this meeting that I referred to continued until about three o'clock Sunday morning, and I would say that call was made after midnight Saturday night.

Q. Now then, on Sunday evening there was an arrangement entered into by the United States Trust Company of Johnstown, the Peoples State Bank and the Greek Catholic Union, with the consent and approval of the Banking Department?

A. Right.

Q. You said yes to that?

A. I did.

Cross-examination.

By Mr. Hoehrle:

Q. Who was present at that conference?

A. The one at Mr. Stevens' office?

Q. Yes.

A. As I recall Mr. Stevens was there practically all that evening. Mr. Graff and Mr. Davis and myself, Mr. Kondor——

Q. Now then, how sure are you that George Kondor was present at that meeting?

A. Reasonably sure, Mr. Hoehrle, for the reason that there were several Directors of the Peoples State Bank, and Mr. Kondor I think was there.

Q. Well, do you recall, Mr. Phillips, that I sat out in one of the anterooms representing George Kondor that night [fol. 84] until after twelve o'clock, that George was not present, that I send word that I was there to represent him?

A. I recall your being in and out that evening, Mr. Hoehrle; I recall that.

Q. Do you recall that George Kondor was ill and confined to the house at that time?

A. No, I don't recall that, Mr. Hoehrle.

Q. Well now, since you recall I was there representing Kondor, will you say whether or not you are certain or not that Kondor was in the conference?

A. I can't, as I stated before, state with certainty that Mr. Kondor was at that meeting. John Stevens, we had the use of his office, and he was acting for the bank, in a sense acting for the directors.

Q. Mr. Stevens was also one of the Directors of the Peoples State Bank, was he not?

A. Yes, sir.

Q. So the conference between the Union officials and the Bank officials and the State Department representatives were held in his office?

A. Yes.

Q. Now, can you tell us of any other conference starting with the third of April at which you are certain that George Kondor was present?

A. The only conferences with the Greek Catholic Union people were in the afternoon. It was on the afternoon of April 3rd, I would say, that Mr. Kondor was not at that meeting. As I recall it, it was held in the little directors' room of the Peoples State Bank. I think there were eight representatives there, eight trustees, eight male trustees [fol. 85] and one lady, as I recall it, and their attorney, but I think—that is some time ago—I doubt if Mr. Kondor was there, because I think we had difficulty getting Mr. Kondor to that meeting. We were very anxious that we get him there.

Q. Don't you remember that you were not able to get him at any meeting?

A. I do not in connection with the Saturday meeting. At this visit that I refer to at the bank on March 4th I know Mr. Kondor was not at that meeting.

Q. Do you mean March 4th or April 4th?

A. March 4th.

Q. Do you recall that he was at the April meeting?

A. Those meetings were the 4th and 5th of April, Friday and Saturday. I think he was there on Friday but not at the bank on Saturday.

Q. Do you recall in the conference that lasted into the wee small hours on Saturday morning?

A. Yes.

Q. Do you remember that you and I discussed George Kondor transferring to the bank all of his assets?

A. I don't recall that at that time. I do recall such a conversation. You did discuss with me certain matters of that kind.

Q. And wasn't it necessary for you to take that up through me because Kondor was confined to the house?

A. I don't recall that, Mr. Hoehrle.

Q. As a result of your conferences, is it not true that the United States Trust Company of Johnstown took over all of the assets of the Peoples State Bank and guaran- [fol. 86] teed payment to the depositors?

Mr. Davis: Objected to as not cross examination. We will prove that afterwards.

The Court: I think that is perhaps proper. You are talking about a number of negotiations, and I think we can go on to the completion of them perhaps.

Mr. Davis: I was objecting to it as a matter of cross examination, but we are proving that ourselves.

Q. As a result of the conferences between the Greek Catholic Union, representatives of the State Banking Department and the Board of Directors of the United States Trust Company, didn't the United States Trust Company take over all of the assets of the Peoples State Bank and guarantee the payment of its deposits?

A. Yes, finally they did that. Their proposition was this, that they would do that, that they would take over the assets and business of the banks, assume all deposit

liability, not capital stock—capital stock was excepted—assume all deposit liabilities, and that they would liquidate the business of the Peoples State Bank, providing—and that was the whole thing was based on their proposition—providing that the Greek Catholic Union would agree to leave an amount of $200,000.00 on deposit with them for [fol. 87] four years free of interest. Their proposition was conditional. They made their proposition to the Banking Department that they would take over the business and assume the deposit liabilities providing the Greek Catholic Union would do so and so.

Q. Now, it was at the conference that lasted until early Sunday morning April 7th, was it?

A. April 6th, Mr. Hoehrle.

Q. April 6th, that that agreement was reached?

A. It was after midnight, because the results of the meeting were all held after midnight Sunday night in order that everything could be accomplished prior to nine o'clock Monday morning, the official hour for the bank opening for business.

Q. And pursuant to that agreement the United States Trust Company actually did take over all the liability except the capital stock liability of the Peoples State Deposit Bank?

A. Yes.

Q. Mr. Phillips, at that conference where the agreement was entered into was there any representative of the American Surety Company?

A. I don't recall any, Mr. Hoehrle.

Q. And you say you are not certain whether or not Kondor was there?

A. No.

Q. Mr. Phillips, independently of your recollection concerning Kondor's presence, do you know whether or not any notice was given to George Kondor of any intention to enter into the agreement with the United States Trust Company?

A. I do know, I can answer that, Mr. Hoehrle, when we arrived in Johnstown on Thursday night we immedi- [fol. 88] ately got in touch with officers of the Peoples State Bank, requesting them to be present. Now, whether Mr. Kondor attended or not I don't know. He was not there on Friday, but I know he had notice of these conferences.

Q. That is, he was notified to come to a conference, but did he have any notice of entering into an agreement with the United States Trust Company by the Greek Catholic Union?

A. I can't answer that.

Q. That is all.

CHARLES HENRY GRAFF, a witness produced on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

Mr. Davis:

Q. Mr. Graff, you were connected with the *the* State Banking Department in 1924, were you?

A. Yes, sir, I was second deputy secretary of banking.

Q. With headquarters where?

A. At Harrisburg. In April, 1924——

Q. And on or about April 4th of 1924, were you in Johnstown?

A. I received a telephone call from Mr. Phillips on Thursday evening, late Thursday afternoon, and I immediately caught the first train to Johnstown and met Mr. Phillips there. We then went to Mr. Stevens' office, I believe, and conferred all night with the presidents of several of the different banks, Directors of the Peoples [fol. 89] Bank, but principally with the representatives of the different banks, three presidents of three different banks.

Q. Did you go to the Peoples State Bank on Friday?

A. Friday morning we went. Friday morning we went.

Q. Do you remember Mr. Yuhasz, the president and some of the other members coming to the bank?

A. Yes.

Q. Do you remember a conversation relating to about $89,000.00 worth of checks?

A. Well, I don't recall the exact amount of the checks, but I knew there were checks out for a considerable sum, as well as checks that had been forwarded to Mr. Kondor for signature; and if any material amount of those checks had been presented for payment we would have closed the bank, because the bank did not have funds to pay them.

Q. Do you remember whether or not Mr. Yuhasz was there?

A. I told Mr. Yuhasz and one or two other men when they came in. I believe they said they had just come from Homestead—I mean this Greek Catholic Union.

Q. Did you know George Kondor, the President of the Peoples State Bank?

A. Yes.

Q. Had you ever talked to him about the condition of this bank?

A. Well, I am not certain whether I talked to Mr. Kondor on Friday.

Q. Well, prior to Friday, had you talked to him when he was in Harrisburg?

[fol. 90] A. I am not certain of that.

Q. Do you know whether or not Mr. Kondor was in the bank on this Friday? Do you remember that?

A. I couldn't say. I knew Mr. Kondor was ill; someone said that he was ill.

Q. On going over the affairs of the bank in conference with these people, do you remember gooing over the assets of the Peoples State Bank at that time as to determination as to the probable recovery value of percentage of it?

A. No, I don't recall the particulars of it. Mr. Phillips, who had made the examination, was thoroughly familiar with the details, and he has been operating in Cambria County and saw all of the state banks in Cambria and was supposedly familiar with the conditions, and we of course took his judgment.

Q. Do you remember the agreement entered into between the United States Trust Company and the Peoples State Bank, and the agreement that was entered into between the United States Trust Company and the Greek Catholic Union?

A. I knew the agreement was entered into, but I was not familiar with all of the details.

Q. And unless these agreements had been entered into, what action would either you or Mr. Phillips have taken in regards to the Peoples State Bank?

A. We would have had to close the bank. We worked, I might say, all Thursday night with the presidents of the banks. I was working practically all day Friday and Friday night while Mr. Phillips was at the bank; I was con-

[fol. 91] ferring with the officers of the local banks, endeavoring to have one or more take that bank over to save the situation, because the condition in Johnstown at that time was not good; in other words if this bank had closed there would probably have been other closes.

Q. What do you mean by closing the bank?

A. Well, if we had closed the bank——

Q. What do you mean by that?

A. Well, if these checks that were out and had been countersigned and in transit, you might say—if they had been presented at the bank we would have closed the bank.

Q. What do you mean by closing the bank?

A. Closed the door and taken possession for the purpose of liquidating.

Q. Liquidation by whom?

A. By the State Banking Department.

Q. As receivers in charge?

A. As provided by law.

Q. Now then, with the bank in that condition this agreement was then entered into and the bank assets were then transferred to the United States Trust Company?

A. As provided by the agreement, we permitted the United States Trust Company to open the Peoples Bank on Monday morning at nine o'clock.

Q. That was, just open as part of the United States Trust Company and not as Peoples State Bank?

A. If I remember correctly, if my memory serves correctly, there was a big sign in front of the bank. I am not certain whether they opened that morning as United States Trust Company or as Peoples State Bank, but they had [fol. 92] control of it and had guaranteed the deposits.

Q. You were familiar with the reports that Mr. Phillips had made to the Department?

A. Yes, sir.

Q. And you were familiar with the condition of the Peoples State Bank on the Friday when you got there?

A. Well, I was advised by Mr. Phillips of the condition. I had not gone over the records myself.

Q. Would you say that was a safe bank to have on deposit the sum of $245,000.00 by one individual concern?

Mr. Hoehrle: Objected to as not properly qualified for expert opinion. The condition of the bank is now before the Jury, and that is for the Jury to decide.

The Court: We will overrule that objection. These bank examiners I think are in better shape to state that than the Court or Jury.

Q. I will withdraw that question.

Cross-examination.

Mr. Arthur:

Q. You say, Mr. Graff, that the condition of all the banks at Johnstown at that time was somewhat precarious?

A. No, I wouldn't say that.

Q. What did you say?

A. I said that there were several other banks in Johnstown that if there had been a closure here, it would un- [fol. 93] doubtedly have precipitated the closure of other banks which were later taken over.

Q. What was the cause of that condition?

A. Well, I would say principally frozen assets, the investment in loans that could not be liquidated readily.

Q. Weren't those frozen assets almost entirely coal securities?

A. To a great extent, yes, sir.

Q. And there was a great slump at that time in the coal markets?

A. I wouldn't say coal securities, but there were loans based on coal properties as securities.

Q. On coal values?

A. Yes.

Q. Which took a heavy slump at that time; is that not so?

A. I don't know when they carried it, but they took a slump at that time. I don't know just when they carried it.

Q. That's all.

Harry J. Phillips recalled.

Direct examination.

Mr. Davis:

Q. From your examination of this bank and from your several banking experiences that you have testified to,

would you say that that was a safe bank for an individual to deposit the sum of $187,935.61 on checking accounts?

Mr. Arthur: Objected to for the reason that it is not [fol. 94] shown here that any individual had any such deposit.

Mr. Davis: This to be followed by proof that there was such an amount.

The Court: What is the use of that? Go ahead; I will overrule the objection with the understanding that it is to be followed by proof to that effect.

Q. (Reporter read the previous question.)

A. Absolutely not.

Q. Was it a safe bank for the Treasurer of the Greek Catholic Union to have on deposits such deposits as he did have there at the time of your examination?

A. It was unsafe for any person to have on deposit any amount like that in proportion to the total deposits.

Q. Were you there on the Monday following this agreement that was entered into between the various parties that has been testified to?

A. You mean Monday, April 7th?

Q. Yes.

A. I was in Johnstown practically all that week.

Q. Did the bank open again as the Peoples State Bank?

A. No, the Peoples State Bank that closed on Saturday afternoon, on Saturday, never again opened as the Peoples State Bank.

[fol. 95] Cross-examination.

Mr. Arthur:

Q. You state that this bank was unsafe for a large deposit of the size mentioned; that is because of the fact that it did not have the cash funds on hand to pay out?

A. Largely due to that fact, because of the frozen condition and lack of proper reserves, but as of date of April 7th or April 4th their reserves were greatly in excess of legal requirements, but still that did not mean anything for safety, proportionate to that big deposit. The withdrawal of any large sum would take away any of the safety that would naturally be built up by carrying in excess of the legal reserves so that while that affected this particular

bank, in answer to your question, because of its frozen condition, yet any bank with certain big individual deposits is subject to big withdrawals, as a result of which it would simply wreck the bank.

Q. Well now, Mr. Phillips, that condition was evident in a number of banks in Johnstown at that time, was it not?

A. The frozen condition, but not the distribution of deposits, to my knowledge.

Q. That's all.

[fol. 96] E. RAPHAEL CHERRY, a witness produced on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

Mr. Davis:

(Marked plaintiff's exhibit "D".)

Q. What is your name?
A. E. Raphael Cherry.
Q. And where do you live, Mr. Cherry?
A. I live in Conemaugh, Pennsylvania.
Q. How long have you lived in Johnstown?
A. Twenty-five years or more.
Q. What is your occupation?
A. Banking clerk.
Q. How long have you been a banker?
A. Nine or ten years.
Q. In 1924 were you employed in a bank?
A. Yes, sir.
Q. And where?
A. The Peoples State Bank in Johnstown, Pennsylvania.
Q. And what was your position there?
A. I was cashier at that particular time.
Q. And you had not been there long, had you?
A. No, I hadn't; four or five months.
Q. Do you know Mr. Kondor, one of the defendants here?
A. Yes.
Q. How long have you known him?
A. Twenty years.

Q. And was he connected with the Peoples State Bank at that time?

[fol. 97] A. Yes.

Q. What office.

A. President and director.

Q. Did he have any stock in the bank.

A. Yes.

Q. Do you know whether or not he was connected with the Greek Catholic Union?

A. Yes.

Q. What office did he hold in the Greek Catholic Union?

A. Treasurer.

Q. Did he have any deposits in the Peoples State Bank?

A. He had a number of deposits.

Q. As what?

A. As Treasurer of the Greek Catholic Union.

Q. As president of the bank and director and stockholder, was he familiar with the condition of the bank?

A. I would say that he was.

Q. Had you been with him when that was discussed?

A. Yes.

Q. And do you know whether or not that matter had been discussed between you and him and Mr. Phillips, the bank examiner?

A. Yes.

Q. I show you exhibit "D" and ask you what that is?

A. This is a copy of the condition of the Peoples State Bank at the close of business March 31, 1924, setting forth in detail the assets and its liabilities.

[fol. 98] Q. Do you have a statement of the condition of the bank as of April 5th, I guess it would be, the Saturday, or April 4th the Friday prior to its taking over by the United States Trust Company in your papers there?

A. I have a statement here as of the close of business on April 5th. I don't know whether I have one prior to that time. April 5th was the date this bank was purchased by the United States Trust Company.

Q. Is this the last statement?

A. Yes, as of the Peoples State Bank, yes.

(Marked plaintiff's exhibit "E".

Q. I show you exhibit "E" and ask you what that is?

A. This is a copy of the condition of the affairs of the Peoples State Bank of Johnstown as of the close of business on the 5th day of April, 1924.

Q. And was that the last day on which the Peoples State Bank was opened for business?

A. Yes, sir.

Mr. Davis: I offer in evidence exhibit "E".

Mr. Arthur: If the Court please, this is objected to unless this witness has compiled it, which is not shown so far; unless he has taken the statement himself.

The Court: Let us see before we proceed what the facts were in connection with the preparation.

[fol. 99] Q. All right, you were the cashier of the bank, were you, Mr. Cherry?

A. Yes.

Q. Who prepared this statement?

A. Let me see it please, Mr. Davis? (Witness examined exhibit). Those are my figures.

Q. Where did you get these figures?

A. From the books of the Peoples State Bank.

Mr. Davis: I renew my offer of exhibit "E".

Q. There are two items on that exhibit "E" Mr. Cherry, one of which says "Demand withdrawal total of $239,-419.00." What do you mean by that?

A. Demand withdrawals are simply checking accounts that are subject to withdrawals at any time.

Q. And there is another item there which is designated as time deposits, a total of $162,189.84. What do you mean by that?

A. That is a savings account, or those are savings accounts rather that are subject to all the notice requirements and so forth as any other ordinary saving account in the average bank.

Q. Mr. Cherry, you were familiar with the report of Mr. Phillips, the bank examiner, marked exhibit "B" in this case?

A. Yes, I have read it, Mr. Davis.

Q. Was there much change with regard to the securities held by the Peoples State Bank between the date of that report as of January 15th and the time of the closing of the bank?

A. I would say there was practically no material change in the assets.

[fol. 100] Q. Now Mr. Cherry, do you know Mr. Yuhasz, the President of the Greek Catholic Union?

A. Yes.

Q. How long have you known him, approximately?

A. Well, approximately six years.

Q. On or about, or during the latter part of March, 1924, did you have any occasion to call Mr. Yuhasz on the telephone?

A. Yes.

Q. From where did you call him?

A. I called him from the Peoples State Bank of Johnstown.

Q. And why did you call him?

A. I called him relative to these checks that had been spoken of, these excessively large checks that were being drawn on the bank by the Greek Catholic Union and were going to be sent out to be paid in the regular course.

Q. And from whom did you get that information, that the checks were to be presented?

A. Mr. George Kondor, the president at the time.

Q. And did you make arrangements to see Mr. Yuhasz by the telephone conversation?

A. Yes.

Q. And did you then see him?

A. Yes.

Q. Where?

A. At the Hotel Henry in Pittsburgh.

Q. Did you have conversations there in relation to these checks?

A. Yes.

[fol. 101] Q. And what were the conversations, if you remember?

A. I just can't remember the conversation verbatim by any means, but it was to this extent, that I was there accompanied by possibly one or two other officers of our bank, in connection with these particular checks that I spoke of, requesting that they defer the final signing of those checks and sending them out until some provisions were made by the bank for providing for the payment. We were doubtful at the time that we could meet them.

Q. And you so told him that at the time?

A. Yes.

Q. Did you arrange a conference with him at that time or later on?

A. Not in the City of Pittsburgh to my recollection, although subsequent to that, within a period of likely ten or fifteen days he and other officers of the Greek Catholic Union visited Johnstown and also visited the Peoples State Bank, at which place I did talk to them.

Q. Was it at that time that Mr. Phillips was there?

A. Yes.

Q. Mr. Cherry, you are still interested, I believe, in the collection of these notes and securities that were listed in your report?

A. I am.

Q. About how many of them still remain uncollected?

Mr. Hoehrle: Objected to as being immaterial.

[fol. 102] The Court: I think I will admit it and note an exception.

Q. (The Reporter read the previous question.) About what amount of these assets still remain uncollected, in round numbers?

A. Oh, $80,000.00.

Q. About what amount of the assets was uncollected on about April 7th 1924?

A. $320,000.00 worth, I would say approximately.

Q. That were uncollected?

A. At that particular time.

Q. Well now, on April of 1928, four years afterwards?

A. I would say $140,000.00.

Q. Do you have your sheets there showing that amount that is uncollected at this time?

A. At this particular time? (Produces sheet.)

Q. What amount is now uncollectible?

A. $98,000.00, unconverted.

Q. Since the closing the Peoples State Bank, Mr. Cherry, you have been employed by whom?

A. By the United States Trust Company of Johnstown.

Q. The banks that took over the assets of the Peoples State Bank?

A. That is correct.

Q. And has it been a part of your duties to have this matter in your charge?

A. It has.

Q. So you have been familiar with this matter from the time you went into the Peoples State Bank sometime prior [fol. 103] to 1924 up until the present time?

A. Yes.

Q. Subsequent to April 5th, that is the Saturday on which the Peoples State Bank was taken over by the United States Trust Company, did it ever operate as the Peoples State Bank?

A. No.

Cross-examination.

Mr. Arthur:

Q. You said that Mr. Kondor was familiar with the affairs of the bank. How much time did he spend there during the term of your office, Mr. Cherry?

A. I would say that during the time I spent there Mr. Kondor spent approximately two hours or possibly three hours a day there.

Q. And how much of that two or three hours a day was spent on the bank's affairs and how much on the affairs of the Greek Catholic Union?

A. A very very small portion of his time was devoted to the bank in proper; it was devoted principally to the affairs of the Greek Catholic Union.

Q. He had an office there, I believe, in which he looked after the affairs of the Greek Catholic Union, did he not?

A. He did.

Q. He had a secretary there assisting him in the affairs of the Union?

A. Yes.

Q. Who is that?

A. I am sorry I can't give the name, but the young lady is sitting there (indicating).

[fol. 104] Q. Miss Bullog?

A. Miss Bullog, yes.

Q. What part did Mr. Kondor take in the affairs of the bank?

A. Well, he of course was president of the bank and served in that official capacity as regards the signing of any

kinds of contracts or agreements or anything that required official identification, and no doubt when he had an opportunity he would do something favorable toward the bank in the way of soliciting new business.

Q. But his chief duty was soliciting new business?

A. I would say yes, aside from his duties as an officer, which were not active from the standpoint of a bank.

Q. The real manager was Mr. Cooney, was it not?

A. At that particular time I would say no. It would seem that I was in charge as far as the cashier was concerned.

Q. Did you not at a previous trial of this case about a year ago, when you were asked the question about Mr. Cooney, "Was he not practically the manager of this bank?" Did you not answer "Yes, he was."

A. Yes, sir.

Q. That's all.

Redirect examination.

Mr. Davis:

Q. Relative to the other stockholders of the bank, what interest did Mr. Kondor have in the bank?

[fol. 105] A. I don't understand your question, Mr. Davis.

Q. In relation to the interests in stock he held, how did he compare with other stockholders?

Mr. Arthur: Objected to as immaterial.

The Court: I think that in view of your cross examination is admissible.

A. Yes, Mr. Kondor had—he was by far the largest stockholder.

Q. Do you know how many shares of stock he had?

A. If I remember correctly he had 190 shares at that particular time.

Q. 190 or 290?

Mr. Arthur: If the Court please, that is objected to.

The Court: That will be stricken out.

Q. Do your records show how many shares Mr. Kondor owned?

A. Not the records that I have here, Mr. Davis, but I am safe in making the statement that he was certainly by far the heaviest individual stockholder.

Q. And of course when he was in the bank for two or three hours each day, if there was any matter came up particularly with regard to banking, did you talk with him or advise with him?

[fol. 106] Mr. Arthur: If the Court please, that is objected to as direct examination and leading.

The Court: Yes, objection sustained.

Q. That's all.

Recross-examination.

Mr. Arthur:

Q. Mr. Kondor continued to be the biggest individual stockholder in the bank right up to the time it was transferred, did he not?

A. Yes, sir.

Q. That's all.

I. E. JENDRICKS, a witness produced on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

Mr. Davis:

(Marked plaintiff's exhibit "F".)

Q. What is your name?

A. I. E. Jendricks.

Q. And where do you live, Mr. Jendricks?

A. Johnstown, Pennsylvania.

Q. And what is your occupation?

A. Treasurer of the United States Trust Company.

Q. How long have you been Treasurer of the United States Trust Co.?

A. Since 1922.

Q. You were treasurer in 1924?

[fol. 107] A. Yes.

Q. I show you exhibit "F" and ask you if that is your signature?

A. Yes, sir, that is.

Q. What is exhibit "F"?

A. It is an agreement entered into between United States Trust Company of Johnstown and the Greek Catholic Union of the U. S. A. whereby we guaranteed $200,000.00 deposits.

Q. And dated?

A. The 7th of April 1924.

Q. Mr. Cherry, I believe, the last witness, is an employee of your company?

A. Yes, sir.

Q. And what was a part of his particular duties with reference to the Peoples State Bank?

A. He was liquidiating the assets; he was in charge of liquidating the assets.

Q. As Treasurer of the United States Trust Company, Mr. Jendricks, were you familiar with the assets that were held and owned by the Peoples State Bank at the time it was taken over or just prior to the time it was taken over by the United States Trust Company?

A. No, after it was taken over.

Q. Yes, after it was taken over, and you were familiar with those assets that were received?

A. Yes.

Q. And were you familiar with the condition of the Peoples State Bank from your examination of its assets and liabilities after it was taken over by your bank?

A. I was.

[fol. 108] Q. How long have you been in the bank business in Johnstown?

A. Twenty-five years.

Q. As a banker all that time?

A. Yes.

Q. Now, Mr. Jendricks, from your knowledge of the banks from twenty-five years experience in Johnstown, and from your examination of the Peoples State Bank after it was taken over, and from your examination of the statement of the Peoples State Bank, in your opinion was the Peoples State Bank on or about April 1924 a safe bank for an individual to have deposited the sum of $187,935.61, by one depositor on a checking account?

Mr. Arthur: Objected to as incompetent and immaterial.

The Court: Objection overruled. That was the under-

standing, that you were to show such deposits. We will note an exception.

A. I would say it was not.

Q. Mr. Jendricks, as Treasurer of the United States Trust Company, you are familiar with the methods which were used and are being used to collect the assets of the Peoples State Bank?

A. I am.

Q. Had the United States Trust Company in the collection of these assets used every possible facilities that they could to do so?

[fol. 109] Mr. Arthur: Objected to as leading.

The Court: Objection overruled.

A. I positively had.

Q. And there is still a considerable amount outstanding?

A. Yes, sir, uncollectible.

The Court: This is not a very desirable way to put it, but we will let it stand. It is leading.

Q. Since the fifth of April the Peoples State Bank had no control or custody of the assets in any way?

A. Not since the seventh, when we took charge.

Q. You took charge on the seventh?

A. Yes.

Q. And the Peoples State Bank practically went out of business then?

A. Yes.

Q. And the United States Trust Company have had full charge of the assets since then?

A. Yes, sir.

Cross-examination.

Mr. Arthur:

Q. Mr. Jendricks, was there an agreement between the United States Trust Company of Johnstown and the Peoples State Bank?

Mr. Davis: Objected to as incompetent, irrelevant, immaterial and not subject for cross examination, it not having been brought out.

[fol. 110] The Court: Did he testify that they took it over?

Mr. Davis: Yes. I don't think it is material.

The Court: We will see; I think we will allow this much of it at any rate to see where it leads.

A. I believe it was bought for a dollar.

Q. Bought for a dollar?

A. Yes.

Q. Well, was there an agreement in writing for the transfer or how was that managed?

A. Why, it was in writing.

Q. Do you have it here?

A. No, it is in the minutes of our corporation.

Q. Will you furnish a copy of that?

A. It was not called upon.

Q. Do you have it?

A. It is at the bank.

Q. Do you have it with you?

A. No.

Q. When was that agreement entered into?

A. Well now, I can't tell you. I would say probably the fifth or the seventh, but I am not saying positively.

Q. Well, did that agreement antedate or postdate this exhibit "F"?

A. I can't say.

Q. It was in writing, you say?

A. Yes.

Q. Can you bring it into Court and produce it in Court tomorrow?

[fol. 111] A. Well now, is it really necessary for me to come here tomorrow?

Q. We want this agreement. We want to see that agreement.

A. The last time we were down here you didn't want it. If you must have it, of course I will bring it.

Mr. Arthur: Counsel for defendants requests the production of this agreement in order to enable the proper cross examination of this witness.

Q. You said that this was turned over and that the consideration named in the agreement was a dollar?

A. Nearly all agreements are made with the consideration of one dollar, nearly all——

Q. As a matter of fact, the consideration was taking care of the liabilities of this bank, was it not?

A. I am not going to say that.

Q. Will you please speak out?

A. I don't know.

Q. And yet you were one of the men that closed the deal?

A. I didn't close the deal. I didn't get into it until the seventh day when we took charge of it.

Q. And what was your position in the United States Trust Company at that time?

A. Treasurer.

Court adjourned until tomorrow morning at ten o'clock.

[fol. 112] Morning Session

Wednesday, May 7, 1930.

MICHAEL YUHASZ, SR., a witness produced on behalf of the plaintiff, having been first duly sworn testified as follows:

Direct examination.

Mr. Davis:

Q. Mr. Yuhasz, where do you live?

A. Homestead, Pennsylvania.

Q. And what is your occupation?

A. I am Supreme President of the Greek Catholic Union.

Q. And how long have you been President of the Greek Catholic Union?

A. Since 1920.

Q. Continuously, that is all the time since 1920?

A. Yes, since 1920. I am president now.

Q. Do you know Mr. Kondor, one of the defendants here?

A. Yes, sir, I do.

Q. How long have you known him?

A. I know him past 16 years.

Q. Did you know him in 1924?

A. Yes, sir.

Q. What office if any did he have in the Greek Catholic Union at that time?

A. The treasurership.

Q. Supreme treasurer?

A. Yes.

Q. When was he elected?

[fol. 113] A. In 1920.

Q. And he continued in office until when?

A. Until April 7, 1924.

Q. Where are the offices of the Greek Catholic Union?

A. Munhall, Pennsylvania, Homestead Post Office.

Q. That is one of the suburbs of Pittsburgh?

A. Yes.

Q. And what supreme officers are at the offices in Munhall?

A. Supreme president, supreme secretary, assistant secretary and Secretary of the Youth Branch, and the recording secretary.

Q. Where did Mr. Kondor live?

A. Kondor was living at Johnstown, Pennsylvania.

Q. How are the supreme officers elected?

A. By the delegates from the local lodge on the convention.

Q. Where are your local lodges?

A. Our local lodges are all over the United States and a few in Canada.

Q. And about how many local lodges do you have?

A. We have in three branches 1734.

Q. In your general lodges, what do you call it, the supreme lodge?

A. Yes, they all belong to the same supreme lodge.

Q. You have different branches, don't you?

A. Yes, we have three branches, a senior branch——

[fol. 114] Q. And how many lodges are in the senior branch?

A. Oh, there is about 900.

Q. And what is the other branch?

A. The gymnastic branch.

Q. About how many in the gymnastic branch?

A. 300 or more at this time.

Q. And in the Youths' branch?

A. About a thousand local lodges.

Q. And about what is your total membership?
A. Over 134,000.
Q. About what was your membership in 1924?
A. I don't remember exactly what it was in 1924.
Q. Well, wasn't it about the same, or have you grown some since?
A. Oh, about the same, less or more; no, not more.
Q. And is it a fraternal beneficial society?
A. Yes.
Q. Does it pay benefits?
A. Yes, death and cripple benefits.
Q. Do the members pay monthly assessments and dues?
A. The members pay monthly dues according to age.

Mr. Arthur: Objected to; it will be shown by the By-laws.
The Court: And it is admitted in the pleadings.
[fol. 115] Mr. Davis: Yes, that is true.

Q. Now then, how is this money collected?
A. Collected by monthly assessment by local lodges, officers, and then sent to the treasurer at that time.
Q. Sent to the treasurer, directly to the treasurer?
A. Directly to the treasurer; issue checks or money order, some in his name and some in the name of the Greek Catholic Union.
Q. In the payment of benefits, when benefits were paid, death claims or cripple claims, how were checks prepared and sent to the beneficiary?
A. After they are first prepared by the secretary and check issued by the secretary, signed by him and the president and sent to the treasurer. The treasurer got to send them directly to the beneficiary.
Q. After they were signed by the officers?
A. Yes, supreme president, supreme secretary, and sent for signature to the treasurer, and treasurer got to send them to the beneficiary direct.
Q. Do you know Mr. Cherry?
A. Yes, I do.
Q. Do you remember on or about the latter part of March 1924?
A. Yes.
Q. Wait a minute—of an investment that was made by the Greek Catholic Union in certain bonds which they had purchased from Union Trust Company?

[fol. 116] A. Yes.

Q. Do you remember how you had these checks signed?

A. Yes.

Q. What was the amount of these checks?

A. $89,000.00.

Q. And how did you get them signed?

A I sent them to the secretary and we went to Johnstown.

Q. Who went to Johnstown?

A. And took them—the treasurer, and he signed it and we came back.

Q. All right, do you remember what day that was you went to Johnstown?

A. The 30th of March 1924.

Q. What day of the week was that?

A. That was Sunday.

Q. Now then, you came back, you say from Johnstown, back to where?

A. We left Johnstown that time 12:28 and we arrived in Pittsburgh 2:16 after middle night, Monday morning.

Q. All right now, what happened Monday morning?

A. Monday afternoon 1:47, that time the train was running from Homestead to Pittsburgh, me and the secretary was intend to go to deposit those checks in the Union Trust in Pittsburgh, because we bought the bonds, and before we was ready, my telephone rang from Johnstown. The secretary went on the line and then turned over the receiver to me. There was Mr. Cherry on the line and I asked him—[fol. 117] no, he asked me, he understood we countersigned checks on the evening in the amount of $89,000.00 and we going to deposit them to Union Trust for collection, and I told him "that is true" and he asked me the question what he going to do if they can't honor those checks. Well, I told him that the money there in the checking account was subject to check at any time.

Q. Well then, what did he say?

A. Well, I asked him further "what is the trouble?" and he says he can't tell me. We have got a meeting of the Board of Directors, and I told him to arrange the next day, that is Tuesday morning for a meeting of the Board of Directors. He told me it can't be done, because one is absent on legal matters somewhere, and I told him to take next train to come to Pittsburgh, I want to meet him in

Hotel Henry, I can't talk over the telephone about the matter. So he did come to the Hotel Henry.

Q. Was this the same day you had this telephone conversation?

A. Yes.

Q. All right, did you meet him at the Hotel Henry?

A. Hotel Henry, met with him.

Q. And who was with him?

A. John Cooney, and we went to the second floor. The Supreme Secretary George Komlos, Steve Tkatch, he was President of the Supreme Auditors, and Anna Kalmas. I tell him cool off, might not talk so loud. I told him somebody from Johnstown might overhear his conversation, [fol. 118] and if that bank in Johnstown was not in good condition might be a run on the bank.

Q. What did Cherry tell you about the condition of the checks for $89,000.00?

A. Cherry told me those checks would not be paid on collection.

Q. What did you do in regard to further communication with the bank directors?

A. The same night after we parted with Cherry and Cooney we had called Mr. Thomas S. Brown.

Q. I know, but what arrangement, if any, did you have with Cherry and Cooney?

A. Cherry proposed that we meet the directors some week on Friday afternoon.

Q. Where?

A. Johnstown, Peoples State Bank.

Q. And who do you mean by "we"?

A. I mean the officers of the Greek Catholic Union.

Q. All right, did you go to Johnstown on Friday?

A. Yes, we went to Johnstown on Friday.

Q. And what time, if you remember, did you get to Johnstown on Friday?

A. We got in around about three o'clock.

Q. And where did you go?

A. When we come to Johnstown station, I direct them, I take lead with one man, and the rest follow with me about 50 feet distant, and I going to lead them there to the side of the bank so there would be no suspicion around there, and then we came in the bank.

[fol. 119] Q. And who did you meet in the bank?

A. I meet George Kondor there.

Q. Mr. Kondor was there in the bank that afternoon?

A. Yes, and I asked him what was wrong, and he said he didn't know anything at all.

Q. And who else?

A. In the Directors' room. Mr. Stevens and the Banking Examiners.

Q. Who were the Banking Examiners?

A. Mr. Graff, Mr. Phillips, and I don't know the others.

Q. There were three men from the bank? Now, was Mr. Kondor with you at that time?

A. He was in the bank, but he refused to come in the room.

Q. What do you mean by refused to come in the room?

A. To come in this same room with the Banking Examiners and the Trustees of the Greek Catholic Union.

Q. I know, but where was this room that you say you went into?

A. The room was in the left, we came to the side here, and to the left was the Directors' room, and George was a little piece from the door.

Q. Was Kondor standing near the door?

A. Yes.

Q. Could Kondor hear what was going on there?

A. Yes, he could hear good what was going on.

Q. Did you talk to Mr. Graff?

[fol. 120] A. Yes.

Q. What did Mr. Graff say?

A. Mr. Graff told me if we deposited any of those banks he close the bank Monday morning.

Q. You mean deposit any of those checks?

A. Any of those checks, I mean for collection.

Q. Did you present the checks?

A. No, we did not.

Q. Why not?

A. Why, because Mr. Graff told us not to. If we do he close the bank.

Q. Did he tell you anything else?

A. He told me that the bank be closed by the banking——

Mr. Arthur: This is objected to unless the conversation took place in the presence of Mr. Kondor.

Mr. Davis: We have Mr. Kondor standing outside the door.

Mr. Arthur: The statement was made that Mr. Kondor was outside the door.

The Court: Let us repeat again where Mr. Kondor was with respect to conversation.

(Reporter read previous questions and answers on this point.)

The Court: Objection overruled and note an exception.

[fol. 121] Q. All right then, after he told you that if you presented these checks he would close the bank, what else did he tell you?

A. He told me that if it was liquidated by the Banking Department we probably wouldn't get more than twenty to forty per cent on the dollar.

Q. All right, did he say anything about making arrangements to take over the bank?

A. Yes, after awhile he told me he was going to try his best that some of the banks in Johnstown might take that over.

Q. There were a number of conferences between the different bankers and so forth which finally led to the signing of an agreement between the Greek Catholic Union and the United States Trust Company?

A. I didn't understand the question.

Q. (Reporter read the previous question).

A. Yes, sir.

Q. Did you meet with the other officers of the Greek Catholic Union in conference with them during this Friday, Saturday and Sunday?

A. With those banking people?

Q. No, with the other officers that were with you of the Greek Catholic Union?

A. Yes.

Q. And did you tell them what Mr. Graff had told you with reference to the situation?

A. Why, they was present with me when he told me that.

Q. And they had the same knowledge that you have testified to here?

A. Yes.

[fol. 122] Q. I show you exhibit "F" and ask you if this is your signature?

A. Yes.

Q. You signed exhibit "F" as the President of the Greek Catholic Union?

A. Yes, sir.

Q. Were you authorized to do so by the other Supreme Officers of the Society?

A. I am authorized by the Constitution and By-laws, section 26.

Q. Let me ask you another question, before this agreement, exhibit "F" was signed, there was a meeting of the Supreme Officers of the Greek Catholic Union at which this agreement was submitted——

Mr. Arthur: Objected to as leading. The minutes of that meeting would be the best evidence.

Mr. Davis: It is leading, no question about that.

Q. What was done with this agreement before it was signed by you?

A. Why, I had the Board of Trustees, composed of nine supreme Officers, and I called a meeting to order, and this agreement was read and ratified by the Board of our trustees.

Mr. Arthur: Objected to as incompetent, not being the best evidence. If there was a meeting held there, there is a record of that meeting.

The Court: It would not be a higher class of testimony [fol. 123] than one who was there and testified to what occurred at that meeting.

Mr. Arthur: I will withdraw my objection.

The Court: I think so, Mr. Arthur. It is the same grade of testimony.

Mr. Davis: I offer in evidence plaintiff's exhibit "F".

Mr. Arthur: Objected to, if the Court please, for the reason that the authority of the President and Secretary of the Greek Catholic Union to execute this is not shown, and for the further reason that there is no evidence that the intention to make this agreement was communicated to either of the defendants, and for the third reason that the agreement was not participated in by either of the defendants.

Mr. Hoehrle: Before ruling on that, your Honor, I would like to move to strike out the testimony of the witness to the effect that his authority to execute this agreement is set forth in the By-laws, for the reason that that testimony is

not the best authority, and we now call upon the plaintiff to offer the By-laws which grant that authority.

The Court: Have you offered that, Mr. Davis?

[fol. 124] Mr. Davis: No, we have not offered that part of the By-laws as to the authority of the president, and I haven't any objection to that part being stricken off.

The Court: Let it be stricken off. The By-laws will be the best evidence.

The Court: I will admit it (exhibit "F") and note an exception.

Mr. Davis: (Reads exhibit "F" to the Jury.)

Q. After this agreement was entered into did you receive these certificates of deposit from the United States Trust Company?

A. Yes, Monday morning.

Q. And when were they paid?

A. They were paid April 7, 1928.

Q. You received no money on those certificates from April 7, 1924, until April 7, 1928?

A. No.

Q. Did you receive any interest?

A. No interest.

Cross-examination.

Mr. Arthur:

Q. Were you present at the drawing up of this agreement, Mr. Yuhasz?

A. I don't understand your question.

Q. (Reporter read the previous question).

A. No, I was not.

[fol. 125] Q. When did you first see it?

A. I first see that paper was drawn and presented to me, and I presented it to the Board of Trustees. That was Monday morning, April 7, 1924.

Q. What time Monday morning?

A. About ten minutes or fifteen minutes after twelve.

Q. Where were you?

A. I was in Fort Stanwix Hotel in Johnstown.

Q. Who brought it to you?

A. Mr. Davis.

Q. Mr. Davis here?

A. No, Mr. Davis and someone from the United States Trust Company; I don't know his name.

Q. Did you read it over before you signed it?

A. It was read before the Board of Trustees, yes, sir.

Q. In this agreement you state that "George Kondor, supreme treasurer, has notified the Supreme Officers of the Greek Catholic Union that he has failed to keep intact and absolutely account for all funds of the Order in accordance with the Constitution and By-laws of the Greek Catholic Union, in that the Peoples State Bank of Johnstown will not pay certain checks which have been drawn." When did Mr. Kondor give you any such notice?

A. When he gives notice?

Q. How?

[fol. 126] A. Notice was given, the treasurer refused to pay checks.

Q. When did Mr. Kondor notify you that he had failed to keep intact and absolutely account for——

A. He didn't, no, but the bank treasurer did, the Bank Treasurer of the Peoples State Bank.

Q. Then George Kondor did not give you such notice?

A. But—because he didn't perform his duty.

Q. He didn't give you notice that he had failed to keep intact the funds of the society?

A. No, he didn't.

Mr. Davis: Do you understand what Mr. Arthur is asking you there?

A. Well, he asked me if Kondor notified us any time that he didn't keep the Greek Catholic Union's funds intact.

Mr. Davis: Yes, but what is your answer to that?

A. That is, I understand this way, that what Mr. Arthur means, whether or not he notified us that he didn't do it, didn't keep our funds intact.

Mr. Davis: Wait a minute, what was your answer to that?

A. I say no, he never notified us.

The Court: Let him go ahead, and you can correct [fol. 127] any misunderstanding, if any there be at the end of his cross examination.

Q. You signed this agreement, however, knowing that that statement was in it?

A. I signed that agreement, and I would know—well, what I did sign it.

Q. How?

A. I would know very well what I did sign it.

Q. You knew that was in it when you signed it?

A. Yes, I did.

Q. Although you state that was not the fact?

A. That was true, that I did sign it.

Q. You just said now that Mr. Kondor gave you no such notice?

A. Well, he never gave no notice.

Q. Well, your agreement states that he did; which is correct?

A. You are trying to bolix me up; I didn't understand your question.

Q. I ask you which statement is correct, the statement in the agreement or the statement you make now?

A. The agreement I signed is correct.

Q. Then the statement you made on the stand is not correct, is it?

A. I don't understand the different questions you ask.

Q. I want to be fair with you, Mr. Yuhasz; let me ask you again, I want you to understand exactly what you are [fol. 128] answering. In your agreement, which you say you signed after having it read to you.

A. Yes.

Q. You recite "Whereas the said G[illegible] Kondor, Supreme Treasurer, has notified the Supr[illegible]e Officers of the Greek Catholic Union that he has failed to keep intact and absolutely account for all funds of the Order in accordance with the Constitution and By-laws of the Greek Catholic Union, in that the Peoples State Bank of Johnstown will not pay certain checks which have been drawn." I asked you when Mr. Kondor had given you that notice that he had failed to keep intact and fully account for the funds of the order?

A. I answered that question before, that Mr. Cherry, when he——

Q. And your answer is that Mr. Kondor never gave you such notice?

A. No, he personally, no; that was they refused to pay the checks.

Q. Did Mr. Cherry ever give you notice that Mr. Kondor had failed to keep intact and absoluetely account for all funds of the Order?

A. I don't know; I don't remember.

Q. This was handed to you at that time, did you say? This agreement?

A. Maybe five or fifteen minutes after twelve; that was the 7th of April, Monday morning.

Q. Do you know how this agreement was prepared, by whom?

[fol. 129] A. It was prepared by our attorney, and attorney from the United States Trust.

Q. Were you present when it was prepared?

A. I authorized Mr. Davis to do so.

Q. You were not present when it was prepared?

A. I was present in hotel.

Q. Did you assist in the preparation of the agreement?

A. How?

Q. Did you assist or help in the preparation of the agreement?

A. Yes, some parts, yes.

Q. Now, going back to your statement, referring to your trip to Johnstown?

A. Yes.

Q. You had prepared checks for $89,000.00, I believe?

A. That was prepared Monday, yes.

Q. That was on Monday, March 30th?

A. No, March 31st.

Q. It was on March 31st that you took those checks to Johnstown?

A. We took the checks for signature March 30th.

Q. That is on Sunday?

A. Yes, sir.

Q. What was the practice in issuing checks for any withdrawals from the funds of the Order?

A. Why, when we found out the checking account over more money in it than we expect to be, we take the security——

Q. Just a minute, you are not answering my question. [fol. 130] How were moneys withdrawn from the bank, moneys of the society withdrawn from the bank?

A. On three signatures, president, secretary and treasurer.

Q. Who prepared the checks?

A. The secretary.

Q. Who had the checks and stubs in his possession?

A. The secretary.

Q. After the checks were written what was then done with them?

A. After was written, why signed by secretary, president, and sent to the treasurer for signature, and he directed to send them right away to the beneficiary.

Q. Well now, as to these checks for $89,000.00, there was no beneficiary to whom you would send them; what would be the practice?

A. The practice in that case would be that we live here in Homestead and they are made payable to Union Trust Company of Pittsburgh, the main secretary.

Q. By whom were those checks prepared?

A. By secretary.

Q. By whom were they signed?

A. By me, secretary and treasurer, George Kondor.

Q. By you and by the secretary and treasurer, you say?

A. Yes.

Q. Did Mr. Kondor ever have the preparation of any checks?

[fol. 131] A. We never had such system that the treasurer makes the checks out.

Q. You never had such a system?

A. No.

Q. Could the treasurer have made a check for withdrawals himself?

A. He can't deposit checks that he receive- from local lodges.

Q. He couldn't make withdrawals of such moneys?

A. He not make them without secretary, president and treasurer's signatures.

Q. And in order to make any withdrawals, as I understand you, for any purpose whatever, the first person to have anything to do with it would be the financial secretary, who drew the check and signed it, is that correct?

A. Yes.

Q. And the second person would be the president, who would sign it?

A. Yes.

Q. And the third person would be the treasurer?

A. Yes.

Q. So that before the treasurer could withdraw any money or apply any moneys to any purpose he would have to have a check drawn by the financial secretary and signed by the financial secretary and the president?

A. If he attempted to draw money out of the money already deposited in the bank he couldn't do it; otherwise he would hold money from the local society.

[fol. 132] Q. Before the treasurer could withdraw any money from the bank deposited to the credit of the society it would be necessary for him to have a check drawn by the financial secretary, signed by the financial secretary and the president of the society; is that correct?

A. That is the legal way under our Constitution and By-laws, yes.

Q. That is correct?

A. Yes.

Q. He could make no withdrawals in any other way from funds on deposit for the society in the bank?

A. I can't answer that question. He might do it; he was the president of the bank.

Q. You have made no accusation of that sort against Mr. Kondor, have you?

A. I stated before, legally he can't do it.

Q. You answer my other question. You have made an accusation here. Answer my question, please: You have made no accusation of Mr. Kondor's withdrawing any funds illegally?

A. No.

Q. Mr. Yuhasz, when you went to the hotel at Pittsburgh on March 30th, who was there, at the Hotel Henry?

A. To the Hotel Henry?

Q. Yes, Pittsburgh?

A. Why, I was there.

Q. Let's see, that was March 31st, was it? That was on Monday afternoon?

A. Yes.

Q. All right now, who was there?

[fol. 133] A. I was there, George H. Komlos, Steve Tkatch——

Q. Not quite so fast. Yourself and——

A. Yes, and George H. Komlos, Steve Tkatch, Cherry and John Cooney. Cooney was there only for a short time.

Q. Who was Cooney?

A. Cooney was one Director of Peoples State Bank, from Johnstown.

Q. Did he have any other office there?

A. No, not at that time.

Q. How?

A. No.

Q. Did Mr. Cooney have any other office in the State bank besides being a director, if you know?

A. No, he was there only a short time and then he went. Somebody called from the William Penn every ten minutes for Cherry, but I don't know who it was. I asked Cherry who it was and he wouldn't tell me the name.

Q. What did Cooney have to do with the Peoples State Bank at Johnstown?

A. I don't know what he had to do with the bank.

Q. Did you ever have any dealings with him there?

A. No, I have no dealings with Cooney.

Q. What part did Cooney take in this conference at the Hotel Henry?

A. He was there only for a short time.

Q. What did he do?

A. Talking nonsensibility was all he did

[fol. 134] Q. How?

A. He was talking about nonsensibility, that's all he did.

Q. He entered into the conference, did he?

A. No.

Q. Well, to whom was he talking?

A. To Cherry, the Cashier of the State Bank.

Q. To whom was Cherry talking?

A. He was talking to everybody there.

Q. You mean everybody there in the conference?

A. He was in the lobby, lots of other people was there. That wasn't in a locked room.

Q. Well, didn't you have a meeting there?

A. No, we didn't have a meeting locked in a room. Everybody sitting around there in the lobby, with Cherry.

Q. Now, then, again when you went to Johnstown on Friday, you saw Mr. Kondor there at the bank?

A. Yes, sir.

Q. What did you say to him when you went to the bank first?

A. I asked him what is the matter with the bank.

Q. What did he answer you?
A. He said he didn't know.
Q. That he didn't know?
A. No.
Q. Did you have any further conversation with him?
A. Not at that time.
Q. At the time you went into the little room for the conference?
[fol. 135] A. I believe it was around three o'clock in the afternoon.
Q. About three o'clock in the afternoon?
A. Yes.
Q. That is on Friday afternoon?
A. Yes.
Q. Where was Mr. Kondor at that time?
A. Why, he was standing by the door.
Q. All the time?
A. Outside the door.
Q. What was he doing there?
A. Why, he was standing there. I don't know what he had in his mind.
Q. Where was his desk?
A. Oh, he wasn't around his desk. His desk was away up in front.
Q. Did he take any part in that conference?
A. He refused to come in. I called him in.
Q. How long was he standing there by the door?
A. Oh, I don't know the exact time, how long.
Q. You saw him there when you first went in?
A. Yes.
Q. Did you see him there afterwards?
A. I seen him after while, yes.
Q. Where did you see him after awhile?
A. In the same place.
Q. Do you know whether he was there all the time?
A. No, I do not.
Q. You didn't present those checks?
[fol. 136] A. No, we didn't. We was told not to do so.
Q. How?
A. We was told by the banking examiner not to do so, and Cherry also, the cashier.
Q. Well, that was Friday?
A. That was Friday, yes, afternoon.

Q. What did you do on Saturday?

A. What did I do?

Q. Yes?

A. I was stay there right along. I want to know what is going to happen.

Q. Were you at the bank?

A. No, I was at Attorney Stevens' office and part in the hotel.

Q. Was Mr. Kondor at the bank on Saturday?

A. He wasn't in bank on Saturday.

Q. Did you see Mr. Kondor on Saturday?

A. I seen him around, yes.

Q. Where?

A. On the street.

Q. Where?

A. I don't remember the street. In Johnstown, not a meeting.

Q. How many times did you see him on the street?

A. Oh, along about five o'clock in the afternoon.

Q. And it was that night, was it, that you went into the conference in Mr. Stevens' office?

A. I want to correct myself. Saturday you are talking about?

Q. Yes.

A. On Saturday he was in Stevens' office.

[fol. 137] Q. Mr. Kondor was?

A. Yes.

Q. What time of the day?

A. Well, I don't know. It must be about close to five o'clock. After four o'clock, anyway. Between four and five.

Q. Have you finished your answer?

A. Yes.

Q. Saturday evening it was then that you went into the extended conference?

A. Yes, we went to Stevens' office also.

Q. How long did that conference last?

A. Oh, it last close to two o'clock Sunday morning.

Q. And what did you do on Sunday?

A. On Sunday I was stay in the hotel.

Q. Were there any conferences then?

A. The conference was between Mr. Davis and President from First National Bank from Johnstown, and that fell through.

Q. Then when did you go into conference on Sunday night?

A. On Sunday night, well that afternoon the banking examiner went to look for somebody else to take that bank over, and then later on they come with directors and officials from United States Trust, and they in conference, I think about six o'clock, if I ain't mistaken. I don't know the exact time.

Q. And it was the Sunday night conference that resulted in this agreement being drawn up?

A. Well, they were drawn up, yes.

Q. Do you know when that was drawn up?

[fol. 138] A. No, I do not.

Q. When did you first see it?

A. I saw it about five or fifteen minutes after middle night. That was Monday morning, April 7, 1924.

Q. They didn't show it to you until Monday morning?

A. No.

Q. That's all.

Redirect examination.

Mr. Davis:

Q. Now, Mr. Arthur asked you about Saturday night or rather early Sunday morning. Were you in the hotel that time?

A. Yes.

Q. Do you remember of a telephone call put in by myself?

A. Yes.

Q. Where was that? What place did I call?

A. You called Pittsburgh, Mr. Benham's private residence.

Q. And who was Mr. Benham?

A. Mr. Benham was representative of city branch of American Casualty Company of New York.

Q. Did you hear the conversation that took place between myself and Mr. Benham?

Mr. Arthur: Objected to; it is not shown that he got Mr. Benham.

[fol. 139] The Court: The circumstances would have to be shown, I take it.

Q. Well, do you remember—just tell us preliminarily before we started in on the conversation, where were you?

A. I was standing alongside you in your room at the hotel.

Q. What did I do?

A. You told Benham to notify New York home office.

Q. Wait a minute, before that, when I first went to the telephone what did I do?

A. In your room?

Q. Yes.

A. Fort Stanwix Hotel.

Q. What did I do, the first thing I went there?

A. You took the receiver off and called Mr. Benham.

Q. What did I say?

A. You told him——

Q. No, before you get into conversation with this man, what did I do?

A. What you did?

Q. Yes.

A. You take the receiver off and call him.

Q. How did I call him? What did I say?

A. You told him to notify New York office about the insurance.

The Court: No, you are going too far.

[fol. 140] Q. What did I say when I first picked up the receiver?

A. You called for Mr. Benham.

Q. I know, but before that what did I do? Did I call for a telephone number or what?

A. Of course you called for a telephone number.

Mr. Arthur: Objected to as very leading. If this man doesn't know what he did, you can't tell him.

STIPULATION (At Side Bar)

It is stipulated between counsel for plaintiff and counsel for defendants that some time early Sunday morning, about 2:00 A. M., Mr. Davis as counsel for the Greek Catholic Union, called from Johnstown Mr. W. E. Benham, Resident Vice-President and Manager of the Pittsburgh office of the American Surety Company and notified him of the situa-

tion at Johnstown. Mr. Davis was informed by Mr. Benham that as such officer or employee of the American Surety Company he had no authority to represent or act for the American Surety Company in such matters, and referred him, Mr. Davis, to the officer in charge of the Claim Department at New York, Mr. B. J. McGinn. That Mr. Davis called Mr. B. J. McGinn at his residence near New York on Sunday morning about 10:00 A. M., and informed him of the situation, when Mr. McGinn informed Mr. Davis that he had no authority to enter into any [fol. 141] arrangement for the American Surety Company, that his scope of employment would not allow him individually to take action which would bind the American Surety Company. The substance of the said telephone conversation being to the effect that the deposit of the Greek Catholic Union in the Peoples State Bank made by its treasurer, George Kondor, was tied up, that the banking department officials had notified the Greek Catholic Union that the bank could not pay certain checks to the amount of $89,000.00; that the failure to pay said checks was considered a default by the Greek Catholic Union on the part of Kondor the treasurer, for whom the American Surety Company were surety upon its bond in a sum not exceeding $100,000.00; that if said checks for $89,000.00 were presented that the State banking officials would close the bank unless a deposit of at least $100,000.00 was placed in the bank by either the American Surety Company, the Greek Catholic Union or some other financial institution; that negotiations were being held with various financial institutions in Johnstown for the purpose of taking over the assets of the Peoples State Bank and protecting the deposits of the depositors therein, and the American Surety Company was requested to have a representative present to participate therein; that any action tending to the solving of these difficulties must be taken by the parties in interest before 9:00 o'clock Monday morning, April 7th, in order to avoid the closing of [fol. 142] the Peoples State Bank. The conversation with Benham occurred about 2:00 o'clock Sunday morning, April 6th, 1924. The conversation with McGinn was along about 10:00 o'clock Sunday morning April 6, 1924. Mr. Davis from his associations with the American Surety Company at Pittsburgh, being aware of the fact that Mr. Benham

would have no authority by virtue of his office to enter into any agreement binding the American Surety Company.

(Above stipulation read to the Jury by the reporter.)

Q. That's all, Mr. Yuhasz.

JOHN MACEY, a witness produced on behalf of the plaintiff, having been first duly sworn testified as follows:

Direct examination.

Mr. Arthur: If the Court please, the Court as I understand it ruled that the statement of Mr. Yuhasz as to his authority to execute the agreement would be stricken out.

Mr. Davis: No. We agreed to strike out that it was done by the By-laws, but it was done by action of the Board of Directors or trustees at that time.

The Court: I have forgotten the exact terms of the motion to strike.

[fol. 143] Mr. Arthur: The motion was to strike out the statement of Mr. Yuhasz that he was authorized by the By-laws to exclude this agreement with the United States Trust Company for the reason that the By-laws were the best evidence. As I recall it, the Court said that would be stricken out.

Mr. Davis: We proved it otherwise, by showing a meeting of the Directors there.

Mr. Davis:

Q. What is your name?

A. John Macey.

Q. And where do you live, Mr. Macey?

A. Binghamton, New York.

Q. Are you a member of the Greek Catholic Union?

A. Yes, sir.

Q. Were you a member of the Greek Catholic Union in 1924?

A. Yes, sir.

Q. Did you hold any office in the Greek Catholic Union at that time?

A. Auditor.

Q. As supreme auditor?

A. Supreme Auditor of the Greek Catholic Union.

Q. Were you in Johnstown along the first of April of that year?

A. From April 3rd to April 7th inclusive.

Q. And were you in the bank, the Peoples State Bank on this Friday afternoon?

[fol. 144] A. Yes, sir.

Q. Do you remember who was there?

A. Well, there were about eight or nine officials of the Greek Catholic Union, three representatives from the Banking Department, Mr. Kondor, Mr. Cherry, another gentleman and a young lady working for Mr. Kondor. I remember those.

Q. Did you hear the conversation that went on between Mr. Yuhasz, the Bank Examiners and Mr. Cherry?

A. Yes.

Q. Did you see Mr. Kondor at that time?

A. Yes, when we arrived at the bank.

Q. And during these conversations did you see Mr. Kondor?

A. I didn't see Mr. Kondor take part in the conversations between the Trustees of the Greek Catholic Union and the representatives of the banking department, but Mr. Kondor was in the banking building.

Q. About how close?

A. When we arrived, after three o'clock P. M., the side entrance was open, and we went through that door, and there Mr. Kondor was standing, between the outside door and the door entering into the directors' room where the meeting was held.

Q. Was this door to the directors' room closed at all?

A. No, it was open.

Q. Did you attend various other conferences during that Friday, Saturday and Sunday?

[fol. 145] A. Yes.

Q. About how many conferences were held, if you remember?

A. Well, there was a conference on Saturday and Sunday and then the one early Monday morning. My recollection is that it was a continuous conference from Friday until Monday.

Q. Were reports made to the Trustees of the Greek Catholic Union as to what was going on in conference at that time?

A. Yes.

Q. I show you exhibit "F", being agreement between the United States Trust Company and the Greek Catholic Union of U. S. A.; was that agreement submitted to the Trustees of the Greek Catholic Union prior to its execution?

A. Yes, sir, at the meeting early Monday morning.

Q. And were the officers authorized to sign that?

A. The president and the secretary were authorized to sign this as officers of the Greek Catholic Union.

Cross-examination.

Mr. Arthur:

Q. Who was present at the meeting when this was signed, this agreement exhibit "F"?

A. Mr. Yuhasz, Mr. Komlos, Mr. Tkatch, Anna Kalmas——

Q. Just a moment. Will you give us the title of these officers as you name them?

A. I don't know that I can. The Supreme President, [fol. 146] Mr. Yuhasz. George H. Komlos, Financial Secretary. Stephen Tkatch, President of the Supreme Auditors. Anna Kalmas, First Lady Vice-President, I believe was her official title at that time, and myself as one of the auditors, and several others whose names I don't remember now.

Q. How many others?

A. At least nine or ten if I remember right.

Q. Nine or ten others?

A. No, all told. There were three or four others, I think.

Q. How was this meeting held? Was it called to order by the president?

A. By the president and the situation presented by the president, the condition of the bank and what agreements had been reached.

Q. Were they any minutes kept of the meeting?

A. My r-collection is that minutes were kept of all meetings, and I believe there were minutes kept of this one.

Q. What was the hour of this meeting?

A. Well, as near as I remember it was before 1:00 A. M. in the morning, around 12:15 or 12:30 Monday morning April 7th.

Q. Was Mr. Kondor present?

A. I don't think he was.

Q. Do you know?

A. Well, I am not positive, because that has been six years ago, and I don't remember that far back.

Q. When did these series of conferences start first?

[fol. 147] A. Well, I guess the first conference you could call would be with the representatives of the banking department at the bank on Friday, April 4th.

Q. Were you present at that?

A. Yes.

Q. What brought up that conference?

A. Well, all I knew, I was summoned by the president to appear in Homestead and instructed to appear the next day to meet the Directors of the Peoples State Bank.

Q. You were instructed to appear in Homestead on Thursday?

A. Yes, and there I was instructed to meet the Directors of the Peoples State Bank in Johnstown on the next day, and instead of meeting them, we met the representatives of the State Banking Department.

Q. And where was your home at that time?

A. Binghamton, New York.

Q. When did you get that notice to appear at Homestead?

A. It was a telegraphic summons or instructions, I think the day before.

Q. Wednesday?

A. Either Tuesday or Wednesday.

Q. It probably would be Tuesday, would it not?

A. Well, I wouldn't say for sure, but it was just a short notice to appear in Homestead.

Q. You went to Homestead then?

A. Yes, sir.

[fol. 148] Q. And the following day went to Johnstown?

A. Yes, sir.

Q. That's all.

Recess until 1:30 o'clock P. M. this day.

Afternoon Session

Wednesday, May 7, 1930.

GEORGE H. KOMLOS, a witness produced on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

Mr. Davis:

Q. What is your name?
A. George H. Komlos.
Q. Where do you live, Mr. Komlos?
A. Munhall.
Q. Borough of Munhall, Allegheny County, Pennsylvania?
A. Yes, sir.
Q. Are you connected with the Greek Catholic Union?
A. I am.
Q. What office do you hold?
A. Financial secretary.
Q. What office did you hold in 1924?
A. The same office.
Q. How long have you been the Supreme Financial Secretary?
A. Since July, 1914.
[fol. 149] Q. Do you know George Kondor, one of the defendants here?
A. Yes, sir.
Q. What office did he hold in the Greek Catholic Union in 1924, in March and April?
A. Supreme treasurer.
Q. Where was your office to transact business for the Greek Catholic Union?
A. The main office, in Munhall, Pennsylvania.
Q. Where did Mr. Kondor live?
A. He lived in Johnstown.
Q. And about how far from Munhall is Johnstown?
A. Seventy to eighty miles, I don't know exactly.

(Marked plaintiff's exhibit "G".)

Q. I show you exhibit "G," plaintiff's exhibit "G," and ask you what these are?

A. (Witness examines checks.) These are checks issued on March 29, 1924, for the purpose of paying for securities, which the Greek Catholic Union had bought.

Q. How many checks are there?

A. (Witness counts checks.) Eleven.

Q. And what is the total amount of those checks?

A. $89,538.50.

Q. Who drew those checks?

A. I did.

Q. Where?

A. In the Munhall office.

Q. And after the checks were drawn, what was done with them?

[fol. 150] A. I submitted them for countersignature to the Supreme President, Mr. Yuhasz.

Q. Did he sign them?

A. He signed them.

Q. Then what did you do?

A. That is on the 29th of March; on March 30th, which was a Sunday, Mr. Yuhasz and Mr. Tkatch, President of the Auditors and myself, went up to Johnstown to the home of Mr. Kondor which was at Southmont, a suburb of Johnstown, where Mr. Kondor signed them.

Q. He signed them as Treasurer of the Greek Catholic Union?

A. Yes, sir.

Q. And then did Mr. Yuhasz and Mr. Tkatch come back from Johnstown?

A. We got back into Pittsburgh early Monday morning.

Q. What were you to do with those checks?

A. We were supposed to have paid for bonds which were bought for the Greek Catholic Union at the Union Trust Company, and for bonds that had been purchased for future delivery.

Q. How were those checks delivered to the Union Trust Company?

A. On Monday afternoon, after lunch, Mr. Yuhasz and myself were about to start for the train at Homestead, Pa., station on our way to Pittsburgh to pay for the securities, when the telephone bell rang and I answered it. Mr. Cherry, the Cashier of the Peoples State Bank, was on the 'phone and he says to me, "I understand you was up at Johnstown yesterday and had Mr. Kondor sign some in-

vestment checks?" I said "Yes, we had". He says "I [fol. 151] understand you took them down along with you." I says "Yes". He said "What are you going to do with them?" I said "We are going to pay for the bonds at the Union Trust Company". And he said "You better not do that, we can't meet payment on those checks."

Q. All right. Did Mr. Yuhasz talk to him over the 'phone then?

A. I says to Mr. Yuhasz "This is a very serious case, you had better get on the 'phone." Mr. Yuhasz talked.

Q. Did you subsequently meet Mr. Cherry?

A. Yes, met Mr. Cherry at the Henry Hotel on Monday evening.

Q. Did he again tell you they could not pay those checks?

A. At that time we asked what the trouble was, why he couldn't meet them. He said, couldn't tell, didn't know until he had a meeting of the Board of Directors at the bank.

Q. What did you arrange at that meeting?

A. Said one of the directors was detained and possibly couldn't hold a meeting of the directors until Friday—arranged with him for the directors to meet Friday.

Q. Did the Board meet him on Friday?

A. Yes.

Q. Where?

A. We didn't meet the whole Board, got to the Johnstown bank on along three o'clock in the afternoon expecting to meet the Board of Directors at the Peoples State Bank, and we were introduced to some gentlemen there as Bank Directors.

[fol. 152] Q. Was there anybody else there at the bank?

A. I saw Mr. Kondor.

Q. Was he at the bank?

A. He was at the bank, yes.

Q. Did you see Mr. Graff, Mr. Phillips, the men that testified here?

A. Yes, sir.

Q. They were at the bank?

A. (No audible response.)

Q. I notice on the first three checks your signature on those. Is your signature on those?

A. No, sir.

Q. Why not?

A. It was issued by the Secretary of the Youths' Branch, John Gorsick.

Q. And turned over to you?

A. Turned over to me.

Q. The others you did sign?

A. The others I did.

Q. And were those checks paid?

A. They were not.

Mr. Davis: I offer in evidence plaintiff's exhibit "G".

Q. Besides those checks you issued other from the Greek Catholic Union?

A. Yes, sir.

Q. For what purpose?

A. For the payment of benefits due beneficiaries of deceased members, and other bills.

Q. About how many of those do you issue a month?

A. Death benefits, checks, approximately $34,000.00.

Q. What you call mortuary checks?

[fol. 153] A. Mortuary checks.

Q. Do you have a record of your checks that were issued?

A. Yes, sir.

Q. Will you get your records showing the issuing of certain checks for investment purposes along in January, 1924?

A. Investment checks?

Q. Yes. Turn to your investment check No. 99?

A. I have got it here.

Q. What is the date of that check?

A. This check No. 99 was issued on February 8, 1924, dated for February 20, 1924.

Q. What was the amount?

A. Made payable to the Union Trust Company of Pittsburgh for sixteen bonds of the New York Central Railroad Equipment Trust of 1917 for $15,737.20; was signed by myself and countersigned by the Supreme President on February 8th, and sent to Mr. Kondor on February 8th, by special delivery.

Q. And when did you receive that check back from Mr. Kondor?

A. This check didn't reach our office until February 29, 1924.

Q. From February 8th to February 29th, where was that check?

A. In the treasurer's hands.

Q. By the treasurer, you mean Mr. Kondor the defendant here?

A. Mr. Kondor up at his office, yes.

Q. How did you fix that date, February 29th?

[fol. 154] A. The date when it got back. On February 29, 1924, we were compelled to issue an additional check for $18.90 covering accrued interest from February 20th to February 29th.

Q. And to whom was that additional check made payable?

A. To the Union Trust Company of Pittsburgh.

Q. Do you know of any reason why that check was held by the treasurer for that length of time?

Mr. Arthur: Objected to, may it please the court, unless there be a reason communicated by the treasurer to this witness.

The Court: Your purpose to show——

Q. (Upon request the reporter read the previous question.) Do you know of any reason which caused delay from February 8th to February 29th?

Mr. Arthur: Objected to unless there is a reason communicated by the treasurer.

The Court: He can answer yes or no; just answer that.

A. I don't——

Q. What was the custom for the return of checks which you sent to the treasurer as to the time in which they were usually returned?

A. Investment checks?

Q. Yes.

A. About three or four days.

[fol. 155] Q. Wasn't any explanation of any kind made to you by the treasurer why those checks were not returned to you within three or four days?

A. No, sir.

Q. You say something about additional interest of $18.00. What made the necessity for paying that additional interest?

A. The original check was made to cover the cost of bonds and accrued interest up to February 20, 1924; nat-

urally when that check didn't get in on time for settlement date we had to issue another check to cover the difference in accrued interest.

(Reporter marks plaintiff's exhibit "F".)

Q. I show you plaintiff's exhibit "F" and ask you if that is your signature?

A. It is.

Cross-examination.

Mr. Arthur:

Q. The green checks attached to this packet are signed by one John Cosak. Who is he?

A. The Secretary of the Youths Branch.

Q. Why were they not signed by you?

A. He issued checks on the juvenile office, the Youths Branch checking account.

Q. How did those checks come into your hands?

A. I told the secretary that we were going up to Johnstown. He issued them and placed them in my hands.

Q. For what purpose were those checks issued?

A. For the purpose of paying for investment bonds.

[fol. 156] Q. They appear to be made to the order of individuals. Who were those individuals?

A. Sir, I didn't get your question.

Q. They appear to be to the order of individuals. For instance, check No. 2176, dated March 21, 1924, is to the order of Mario Penyak and Vaselin Sobrack, $50.00.

Mr. Arthur: I withdraw that question, if your Honor please.

The Court: Mr. Davis gave you the wrong checks.

Mr. Davis: You should have been watching me closer.

Q. These checks were never presented for payment, were they?

A. After we were told by——

Q. Listen, answer my question, you can answer yes or no?

A. No, simply because we were told that they would not be honored.

Q. As a matter of fact you made these investments later, did you not?

Mr. Davis: Wait a minute, that is objected to if the Court please. I can't see what difference it makes what they did with the money after that.

The Court: It would be an immaterial matter I think, Mr. Arthur. Their main claim here, of course, is their loss [fol. 157] of interest on the $200,000.00. Of course the other incidental expenses to the——

Mr. Arthur: The impression is given, if your Honor please, that these investments could not be made because these checks were not paid by the Peoples State Bank.

Mr. Davis: Oh, no.

The Court: I think I will sustain the objection to that.

Mr. Arthur:

Q. Mr. Komlos, you have signed the white checks in this packet. On what funds were those drawn?

A. They were drawn on the General Branch checking account.

Q. How many funds do you have there—how many checking accounts?

A. The Gymnastic Branch for one; the General Branch for other; the Youths Branch and the Orphanage.

Q. That would be four accounts—four checking accounts. How many of those accounts were you required to sign?

A. Two.

Q. Yes? Which were those?

A. The General Branch and the St. Nicholas Orphanage.

Q. Who drew the checks for the General Branch and the St. Nicholas Orphanage?

A. I did.

[fol. 158] Q. After those checks were drawn what did you do?

A. Just what checks do you mean?

Q. After any checks were drawn by you on the General Branch or St. Nicholas Orphanage, just what did you do?

A. The mortuary checks payable to beneficiaries of deceased members were drawn up by me, listed, signed by me, submitted to the president for his countersignature. I would address the envelopes to the local lodges where the checks were supposed to have been sent to, and these mortuary checks with those addressed envelopes would be

sent on to the supreme treasurer for his signature and for him to mail them out direct.

Q. As to the other checks besides the mortuary checks?

A. Now then the investment fund checks I issued and signed. Mr. Yuhasz countersigned, sent them special delivery to Mr. Kondor, sent them to the office and then we would pay for the securities.

Q. Those were drawn by you in the same manner as the others?

A. Yes.

Q. You had the stub books and all in your possession?

A. Yes.

Q. Could anyone else draw those checks?

A. They could not.

Q. Now as to the St. Nicholas Orphanage checks, how were they drawn?

A. Those were drawn on the Munhall office by me, countersigned by the president, and sent to the treasurer for [fol. 159] his signature; and asked the treasurer to send them on to the St. Nicholas Orphanage.

Q. What were those St. Nicholas Orphanage checks?

Mr. Davis: Wait a minute, I don't understand.

Mr. Arthur: Will you read the question, please?

Q. (Reporter read the previous question.) For what purpose were they issued?

Mr. Davis: Objected to.

The Court: I don't see how they affect any issue in this case.

Mr. Arthur: I think if your Honor please, since he has raised the question about the St. Nicholas Orphanage checks, I am entitled to examine him in regard to them in connection with the general examination as to his familiarity with the accounts and the methods used in the district. He has mentioned four different funds here. I want to know what——

The Court: Go ahead; we will find out; I don't see where it throws any light on any issue here.

Q. (On request reporter read the previous question.)

A. Salaries of the farm employees, salary of the direc- [fol. 160] tor, for orphanage supplies, groceries, and whatever they needed there, and for payments of other bills.

Q. What other bills?

Mr. Davis: If the Court please, I——

Q. I will ask you this question. Were you not then building a St. Nicholas Orphanage?

Mr. Davis: I object to this.

The Court: This is a matter of cross examination. If that has any relevancy it is a matter for defense.

Mr. Arthur: All right, if your Honor please, I will withdraw that question.

Q. Mr. Kondor could not make withdrawals, could he, of any funds that were on deposit in any depositories of the Order without checks being made out and sent to him for that purpose; is that correct?

A. That is true.

Q. That is all.

Redirect examination.

Mr. Davis:

Q. Mr. Komlos, as financial secretary you of course are familiar with the financial affairs of the Greek Catholic Union; its investments for——

A. Yes, sir.

[fol. 161] Q. You have charge of looking after its investments?

A. Yes, sir.

Q. During—rather right after the Peoples State Bank closed, was it necessary for the society to secure some money?

A. Sir?

Q. Right after the Peoples State Bank closed, was it necessary for the society to secure some money in order to carry along its affairs?

A. Yes, the Greek Catholic Union was compelled to borrow $40,000.00 at the United States Trust Company to meet the outstanding checks coming in.

Q. And what interest did you have to pay on that $40,000.00?

A. Six per cent.

Q. And how much was that amount, can you tell that?

A. It ran over $500.00, if I recall.

Q. Can you get the exact amount?
A. I don't have that here.
Q. Can you get it for us?
A. By calling the office, maybe.
Q. All right, get the exact amount. Now with the investments of the Greek Catholic Union upon mortgages and so forth, what was your average rate of income during that period?
A. You mean the bonds that could be purchased at that time? The average rate on high grade investments that could have been purchased at that ime was 5 2/10%.
Q. Was that the average return on investments that could be returned to you at that time?
[fol. 162] A. That would be about what the securities returned at that time, yes.
Q. That's all.

Mr. Davis: If your Honor please, I only have one more witness.

Stephen M. Tkatch, a witness produced on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

Mr. Davis:

Q. Where do you live, Mr. Tkatch?
A. Ambridge, Beaver County, Pennsylvania.
Q. And what is your occupation?
A. Bank clerk.
Q. With what bank?
A. The Ambridge National Bank.
Q. How long have you been a bank clerk?
A. This is the ninth year.
Q. Are you a member of the Greek Catholic Union?
A. Yes, sir.
Q. Do you hold any office in the Greek Catholic Union now?
A. No, sir.
Q. In 1924 did you hold an office?
A. Yes, sir.

Q. And what office did you hold?

A. President of the Supreme Auditors.

Q. Was it your duties as President of the Supreme Auditors to make an audit of the Greek Catholic Union?

[fol. 163] A. Yes, sir.

Q. Were you familiar with the financial affairs of the Greek Catholic Union in January, February and March?

A. Yes, sir.

Q. Do you have a record from which you can tell us the amount of money that was on deposit by George Kondor, the Treasurer of the Greek Catholic Union, in the Peoples State Bank of Johnstown on April 15, 1924?

A. Yes, sir.

Q. Will you give us the amount of money on deposit there?

A. Do you want that in detail, or lump sum?

Q. Well, give lump.

A. Including the outstanding checks, $187,935.61.

Q. That was on what account?

A. On the three accounts there, the checking account.

Q. How much on the saving account?

A. We had $23,813.18 of the Orphans trust funds on savings account in that bank.

Q. On which account was that?

A. That was the Orphans trust account on savings account.

Q. Now then there is another account there?

A. Yes, was the savings account.

Q. There were two savings accounts, weren't there?

A. No, just one, the Orphans trust account. Oh, yes, the other three branches had three smaller account-; $29,776.73 that comprises the three accounts.

[fol. 164] Q. That making a total of savings and checking acocunt of how much?

A. Makes a grand total of $241,525.52.

Q. Were you in Johnstown on days April 4th, 5th, 6th and 7th?

A. I was, yes, sir, on April 4th and back again on the 5th, 6th and 7th.

(Reporter marks plaintiff's exhibit "H".)

Q. I show you plaintiff's exhibit "H" and ask you what they are?

A. These are the checks that were still outstanding at the time of the audit, April 4th, 1924, and were found in the treasurer's desk.

Q. How many checks are there?

A. (Witness counts checks.) Sixteen checks.

Q. And what is the total amount of those checks?

A. $4,341.26.

Q. What is the earliest date on one of those checks?

A. March 21st, March 10th, February 27th, 1924, March 10th, March 24th, March 6th, March 6th, March 21st, March 10th, March 21st, 1924.

Mr. Davis: I offer in evidence plaintiff's exhibit "H".

Mr. Davis:

Q. Mr. Tkatch, do you have the record there to show how much was on deposit about January 15th of 1924? Can you tell from your records there?

A. January—I can give you the total month of January.

Q. All right.

[fol. 165] A. General Branch had $61,668.64; Gymnastics, $28,312.17; Youths Branch, $42,031.00.

Q. Will you total that for us?

A. $133,011.81.

Q. 133 or 132?

A. That is as near as I can add here; 132, right.

Cross-examination.

Mr. Arthur:

Q. You were the President of the Board of Auditors were you, Mr. Tkatch?

A. Yes, sir.

Q. How often did you make your audits?

A. It was customary for the President of the Auditors to be in the general office once or twice a week usually, and we would make up the preliminaries once or twice a week; once a month or soon after we closed that month was up, we would make the reconcilement of the statements of the various secretaries and the treasurer.

Q. How did you get your statements from the secretaries and treasurer?

A. Why the receipts were sent in to the secretaries by the various branches by the treasurer with the reconciled sheets of the bank and the cancelled checks.

Q. How often did those come in?

A. Why, once a month or so.

Q. What was done with those reports of the auditors after the auditors made their reconcilement?

A. Why, they were published in the Official Organ.

Q. How often?

[fol. 166] A. Published every month in the secretary's report and then there was another report given semi-annually and annually to the members which showed in addition the general report of the fund.

Q. Were any reports of this sort sent to the officers by the auditors?

A. Well, they had a copy of that.

Q. Who gave them that?

A. The auditors.

Q. The officers were at all times then informed as to the standing of the various accounts of the society or the Order.

A. Well, I wouldn's say "all times". Every time there was a report issued they would be informed.

Q. They were issued about once a month, you say?

A. Usually.

Q. What is the Official Organ you mention?

A. That is the newspaper that is sent to the members of the Greek Catholic Union.

Q. And that shows the standing of the various accounts?

A. Yes, sir.

Q. Is there any report made showing the names of the depositories?

A. That is in the general report, yes, sir.

Q. That is in the general report?

A. Yes, sir.

Q. Do the—rather when is that general report handed in?

A. That goes to the convention.

Q. Is there any report made to the officers of the society [fol. 167] in dictating the various depositories of the society?

A. Well, they are familiar with that right in the office. The auditors do not maintain their office right in the offices.

Mr. Arthur: That's all.

Mr. Davis: That's all.

GEORGE KOMLOS recalled.

Direct examination.

Mr. Davis:

Q. Have you been able to determine what the amount was of the interest on the $400,000.00 borrowed from the United States Trust Company?

A. $571.00.

Mr. Davis: If your Honor please, I think I have all my exhibits offered in evidence; there were some objections made to some of them that your Honor overruled. The plaintiff will again offer in evidence plaintiff's exhibits "A" to "H" inclus-ve; if you want to make your objections to them which were heretofore made, all right.

The Court: I think they have all been offered. Exception to the defendant.

Mr. Davis: Plaintiff will rest.

Mr. Hoehle opened to the Jury.

[fol. 168] GEORGE KONDOR, one of the defendants, called in his own behalf, having been first duly sworn, testified as follows:

Direct examination.

Mr. Hoehrle:

Q. You are one of the defendants, Mr. Kondor?

A. Yes, sir.

Q. And you were treasurer of the Greek Catholic Union in 1922?

A. I was.

(Reporter marked "Defendant's exhibit "1".)

Q. I show you pamphlet marked for identification, "Defendant's exhibit "1" and ask you whether or not it is a true copy of the By-laws of the Greek Catholic Union?

A. (Witness examines pamphlet.) It is.

Mr. Hoehrle: We now offer in evidence copy of the By-laws identified by the witness with particular reference to Section 33 on page 18 entitled "The Auditors", which we desire to read to the Jury.

Mr. Davis: Objected to as incompetent, irrelevant and immaterial as not affecting that which is already admitted as part of the case, that is the By-laws affecting the treasurer; that the offer does not contradict, change, alter or amend the duties of the treasurer as specified in the By-laws which have already bene offered and made part of this record.

[fol. 169] Mr. Hoehrle: Only for the purpose your Honor of showing the addition of the duties calling attention to the irregularities which were imposed on the auditors by the By-laws.

The Court: (Examines the By-laws.)

(Counsel for the defendant read Section 33 on page 18, from "defendant's exhibit No. 1":)

33. The Auditors.—The Auditors are the chief guardians of all the property of the Greek Catholic Union in order to do their duty properly, they must require a report of receipts and disbursements together with invoices and other documents, from all financial officers of the Gr. Cath. Union as follows: from the Financial Secretary, from the Secretary, and from the Manager of the Printing office. Every three months they must make an unexpected visit to the offices of the Treasurer, Financial Secretary, Manager of the Printing Office and any other officer who has anything to do with finances. To Audit the Treasurer and all financial, administrative and evidential books, and, must send a written report to the President showing the result of their audit. They must also publish same, in detail, in the of-

ficial organ. Should they find any minor irregula-tions, they have a right to warn the officer to correct the irregularities, within a certain time or, otherwise, he shall be dealt with officially. In case of greater irregularities they [fol. 170] have to call the attention of the Supreme President who, together with them, and if necessary with other Trustees of the Union see that said irregularities be corrected, or, if necessary, that a law suit be brought. If the Auditors are not satisfied with the decision of the President, or Supreme Assembly, and on account of great irregularities the Auditors were to require the calling of a meeting of the Supreme Tribunal, the President of the Supreme Tribunal must fulfill their desire and call the Supreme Tribunal to meeting, but this is done at the responsibility of the Auditors. One of the three Auditors shall be President of the Auditors and shall be elected by the Convention separately while the other two shall be elected together. The President of the Auditors shall approve all the bills payable by the Union

President of Supreme Auditors must keep in evidence the Statements of cashed checks those received from the: "Treasurer of the Union."

Mr. Davis: Offer further objection, if there were any irregularities on the part of the auditors that such irregularities, if any, would not relieve the treasurer from his duties as specified and designated in the By-laws of the Greek Catholic Union.

The Court: The Court will sustain the objection and note you an exception.

[fol. 171] Mr. Hoehrle: Will you amend my offer, along with those other two Sections, also the last paragraph of Section 41?

Mr. Davis: Object to as incompetent, irrelevant and immaterial for the following reasons: First——

The Court: Let me have that please. What numbers are these?

Mr. Hoehrle: The first two paragraphs and the last paragraph of the section at the foot of the page.

Mr. Davis: First, the defendant has admitted the part of the By-laws specifying the duties of the treasurer. Second, the parts of the By-laws offered in evidence do not relieve the treasurer from any liability for his omissions

which he might do under that part of the By-laws relating to the conducting of the affairs of his office. Third, as immaterial and incompetent in relation to the execution of any contracts by the officers of the Greek Catholic Union for the reason that said question is not raised in the pleadings; further, that the testimony is undisputed that the agreement entered into between the Greek Catholic Union and the United States Trust Company of Johnstown has been fully executed and carried out by both parties and that the proceeds of the said contract and the conditions [fol. 172] thereof were accepted and received by the Greek Catholic Union.

The Court: What pages do you offer, 137 and 138?

Mr. Hoehrle: And then at the top of the next page, your Honor, showing the number required for a quorum.

The Court: What is the purpose of this; are you using Section 44? Make the offer in such a way that I can tell—I can't tell what you purpose to do.

Mr. Hoehrle: The offer is for Sections 37 and 38 and the last paragraph of Section 41.

The Court: All right, we will admit that and note an exception to the plaintiff.

Mr. Hoehrle: With the permission of the Court I will read that to the Jury.

(Counsel for the defendant reads as follows:)

"Article VIII

The Supreme Assembly

37. The Supreme Assembly of the Greek Catholic Union is the chief and executive and directors body of the organization, it consists of the following Supreme Officers collectively, viz.:

(1) The Spiritual Advisor.

[fol. 173] (2) The President.

(3) Three Vice Presidents; one for the State of Pennsylvania, one for the States of Ohio, Indiana and Illinois; one for the States of New York, New Jersey and Connecticut.

(4) Three Lady Vice Presidents; one for the State of Pennsylvania; one for the States of Ohio, Indiana and

Illinois; one for the States of New York, New Jersey and Connecticut.

(5) The Vice-President for the Gymnastic Branch.
(6) The Financial Secretary.
(7) The Assistant Financial Secretary.
(8) The Secretary of the Gymnastic Branch.
(9) The Secretary of the Youths' Branch.
(10.) The Treasurer.
(11) The Three Supreme Auditors.
(12) The General Medical Advisor.
(13) The Standard Bearer.
(14) The Editor-in-Chief.
(15) The Legal Advisor.

38. All the affairs, business and interests of the Union shall be managed, controlled and directed by the Supreme Assembly and, in the intervals between the conventions, it shall have and exercise all the corporate rights and powers of the Union as a corporation, including power to bind the Union by contracts, and shall administer order and direct all those activities, except in so far as, by the By-laws, certain powers and duties are expressly appropriated and delegated to certain supreme officers; but the Supreme Assembly shall not have right or power to alter [fol. 174] or amend the charter or By-laws of the Union, nor shall it have any authority or jurisdiction in trials of complaints of any sort, jurisdiction as to such matters being exclusive in the officials and tribunals designated thereof in these By-laws; and in any action concerning disposition of property of the corporation; a majority of the corporation trustees must concur."

Mr. Hoehrle: The last paragraph of the 41st Section reads as follows:

"41. At the meetings of the Supreme Assembly a majority of the members of the body shall constitute a quorum to do business."

Mr. Hoehrle:

Q. Mr. Kondor, when was the Peoples State Bank organized, do you know?
A. Yes, 1916-17.
Q. Who was the first president of it?
A. I was.

Q. Was it organized under the name of the Peoples State Bank?

A. No, it was Hungarian Russian Slovak State Bank.

Q. How long did it continue to operate under that corporate title?

A. Oh, about three or four years.

Q. And then was its name changed to the Peoples State Bank?

A. Yes, sir.

[fol. 175] Q. When were you first elected treasurer of the Greek Catholic Union?

A. 1920.

Q. Following your election in that year did you attend the session of the Board of Directors or the General Assembly of the Union?

A. I did.

Q. Now, was any banking institution agreed upon at that meeting in which the funds of the Union were to be deposited?

Mr. Davis: Object to as incompetent, irrelevant and immaterial, as under the By-laws that have been offered in evidence and not denied, the treasurer is the only person who has a right to select a depository.

The Court: That is the evidence, certainly it is not the best evidence.

Mr. Hoehrle: That isn't the objection.

Mr. Davis: Further objected to as not being the best evidence of any corporate act.

Mr. Brown: Nothing that this Board of Directors, the Supreme Assembly or any other officer or combination of officers of the Greek Catholic Union could do, would relieve this treasurer of his obligations as treasurer.

[fol. 176] Mr. Brown: No failure to direct him would excuse him from taking good care of the funds, not even inconvenience on their part would excuse him.

The Court: This is rather peculiar; no there wouldn't be; there certainly wouldn't be for any misapplication of funds.

Mr. Brown: If they had directed him to put it into an unsafe bank, it wouldn't relieve him of the obligations if he knew it was an unsafe bank.

The Court: That is true. It is a peculiarly worded By-law.

Mr. Hoehrle: Very peculiar. You see our position, we wanted to start out and show that they had designated a depository during his entire term of office.

The Court: It would be according to the way the authorization would be whether it would mean anything or not. Instruct as to investments, more or less of certain deposits; but as to deposits of checking funds, I don't know. I would sustain the objection as not being the best evidence. I think it is very material here to show the scope of the order.

Mr. Hoehrle: Didn't the Court permit one of the wit-
[fol. 177] nesses to testify as to what went on at one of the corporate meetings yesterday?

The Court: The meeting of the trustees to some extent, yes, but it was different matter than this; here is a matter where the particular wording and authority is of very considerable importance, I think.

Mr. Hoehrle: Will the Court then sustain the objection and grant us an exception?

The Court: I will, on the ground it is not the best evidence.

Mr. Hoehrle:

Q. Mr. Kondor, do you know if minutes were kept of the meetings to which you refer?

A. Yes, there was.

Q. Who kept the minutes?

A. Recording secretary, I am not sure.

Q. Who was the recording secretary at the time of your election as treasurer in 1920?

A. I can't remember, I can't tell.

Q. Does the Greek Catholic Union have more than one minute book?

A. No.

Mr. Hoehrle: I will now call on the plaintiff to produce the minute book containing the records of the minutes of the Supreme Assembly following the convention at which George Kondor was elected.

[fol. 178] Mr. Davis: I would be very glad to do it if he had given me notice before that time; also, if he had given me a date of such a meeting.

The Court: If you had given him the notice in time.

Mr. Hoehrle: I saw a minute book in court.

Mr. Davis: I will be very glad to give you that minute book, if that will do you any good.

Q. Following your election, where were the funds of the Greek Catholic Union deposited?

A. I don't get that question.

Q. Following your election as treasurer of the Union, where did you——

A. Hungarian, Russian Slovak State Bank.

Q. And after the name of that bank was changed to the Peoples State Bank, did you continue to deposit in that bank?

A. I did.

Q. How often did you make deposits, Mr. Kondor?

A. Pretty near every day as they come in.

Q. Did you deposit the funds as you received them?

A. I did.

Q. During the time you were treasurer, did you attend to that work yourself?

A. Part of it myself, and I had the girl attend to that.

Q. What was the girl's name?

[fol. 179] A. I have forgot her name; she's in the court here—Anna Bullog.

Q. How long did you say she worked for you, about three years?

A. About three years.

Q. After the time that she went to work for you what was your customary procedure to get the money into the bank?

A. Get the money from the different lodges over the United States and Canada, make up a banking slip and go to the bank and send a report to the office.

Q. Which office?

A. Homestead, Pennsylvania.

Q. Who received the mail at your office, did you receive it or your secretary?

A. I did.

Q. Who opened that mail and deposited that money?

A. I did, and the girl that works for me.

Q. During the time you were treasurer for the Greek Catholic Union, did you ever withhold the signing of any checks?

A. I don't just get that, I can't hear.

Q. During the time that you were treasurer did you ever withhold your signature from any checks?

A. I did not.

Q. According to the testimony of the plaintiff's witnesses the checks were made out at the general office and sent to you?

A. That's right.

Q. In all cases, Mr. Kondor, did you sign those checks prior to sending them out?

[fol. 180] A. I did.

Q. Were you ill during February and March, 1924?

A. I was.

Q. Were you absent from your office at the bank during that time?

A. I was, exactly.

Q. And while you were absent, who took charge of receiving the money from the local branches and depositing it?

A. My stenographer.

Q. Miss Bullog?

A. Yes.

Q. How often did you send your reports to the supreme office showing the amount you had deposited?

A. To the supreme office?

Q. End of every month?

A. Yes.

Q. Did you send any statement of the amount of your balance in your checking account, was that sent in every month?

A. Yes, sir. In other words the secretary had the privilege of calling up my girl any time he wanted it and find out the balance in the bank; in other words we had to give 2% on balances.

Q. Were your accounts audited by the supreme office at any time?

A. As the By-laws called for, all the time.

Q. Do you remember what the provision of the By-laws was in that respect?

A. I think, every three months.

Q. Following your election in 1920, did you ever receive any notice from the Supreme Assembly directing [fol. 181] you to invest money, surplus moneys, in either savings accounts or securities?

A. I never received notice but we would meet in the main office in Homestead, the executive members and myself and sometimes the auditors were there, and we would decide what bank and how much money we put in.

Q. All right, now did you always place in the banks that they instructed you to, the surplus moneys?

A. Yes, sir.

Mr. Davis: Objected to as incompetent, irrelevant and immaterial.

The Court: Overrule the objection, grant an exception.

Q. Had you ever been called on to sign a withdrawal check of funds for investments in the Peoples State Bank prior to March 31, 1924?

A. Yes, Mr. Yuhasz, Mr. Komlos and Mr. Tkatch come down to my home one Sunday and asked me, sign checks.

Q. Did you sign the checks?

A. I did.

Q. Did you go to the bank and see if sufficient funds were there to pay them?

A. On Monday morning I called the bank and told them Mr. Cherry, I signed $89,000.00, prepare yourself to be able to meet them.

Q. What is that last?

A. Prepare yourself to be able to meet them.

[fol. 182] Q. Anything else said there about those checks?

A. Don't know whether able to meet them; I told him I am not talking to you as treasurer of the Greek Catholic Union but as the president of the Peoples State Bank.

Q. You were president of the bank, witnesses for the plaintiff say on Friday, 4th of April, 1924, when some of the supreme officers came to Johnstown?

A. I was.

Q. Did you talk to them at that time?

A. Mr. Cherry told me that they had made some arrangements that Mr. Yuhasz with some attachment to come down Friday evening, so I was waiting for them to meet them; the whole Assembly come down, so I met them there.

Q. Did you talk to them about the condition of the bank?

A. Mr. Yuhasz asked me what the trouble is; I told him "I don't know what the trouble is; you are here, the State Department is here; I don't know what is wrong."

Q. They went to a room to the left of the bank and there talked to the representative of the Banking Department?

A. Yes.

Q. Were you there?

A. I was there.

Q. Did you hear that talk?

A. I was sick of it; I don't know exactly what was going on.

Q. How long had you been sick then, George?

[fol. 183] A. I was sick about two weeks before that and I got worse than I ever was.

Q. Did you talk to these same men on the next day, on Saturday?

A. Well, I say "hello" to them; had no business talk with them.

Q. Were you present at any of the conferences with the bankers in Johnstown, and John Stevens and the rest of the Board of Directors of the People's State Bank?

A. I wasn't there.

Q. Were you present at any of the conferences of the Supreme Catholic Union and any of the representatives of the Johnstown banks?

A. I was not.

Q. Did you know anything of the agreement between the Greek Catholic Union and the United States Trust Company concerning the agreement for $200,000.00 until after the agreement was executed?

A. I don't know it.

Q. Were you consulted about it at all?

A. I was not.

Q. In the conduct of your bank, who had active charge of the business?

A. Mr. Cooney, vice-president of the bank.

Q. Was he also a member of the Board of Directors?

A. He was.

Q. Was he a man of banking experience in Johnstown?

A. He organized about a half a dozen of them around there; all I know that's all he ever did, his experience.

[fol. 184] Q. He has always been a banker in that community?

A. Yes, sir.

Q. Well, did you yourself take personal charge of the discounting of loans, who had charge of that?

A. The discount committee, Mr.——

Q. How often did you go to the bank?

A. We had meeting once a month.

Q. How often did you go to the bank?

A. I was in the bank when I was treasurer, down there pretty near every day or second day.

Q. Did you have an office as president of the Greek Catholic Union, too?

A. I did.

Q. Where?

A. In the rear of the bank.

Q. In the rear of the bank building?

A. Yes.

Q. There is testimony here that some checks were found in your desk, do you know anything about those checks?

A. No, don't know nothing about those checks.

Q. How long before the 7th of April, except for that Friday when you met these men, had you last been in the bank?

A. I couldn't tell you exactly, it so long ago, I was there for quite awhile, I was sick in bed.

Q. Mr. Kondor, would you be able to say whether or not the amount on deposit with the People State bank just prior to April 7, 1924, was an *ann*ually large amount?

A. It was.

[fol. 185] Q. Was the Union accumulating money to erect some buildings?

Mr. Davis: Objected to if the Court please; what difference would it make what the purpose was, they had the money there.

Mr. Hoehrle (side bar): We offer to prove by the witness on the stand that the amount on deposit on April 7, 1924, was an unusually large amount which came in because of unusual assessments levied so that the plaintiff might erect some buildings.

Mr. Davis: Objected to as incompetent, irrelevant and immaterial as this witness has not qualified himself as being the proper person to testify to such a state of facts if such a state of facts existed, and his testimony would not be the best evidence of any corporate action of the Greek Catholic Union to accumulate a fund of money if such were the case.

Mr. Brown: Whatever purpose the Greek Catholic Union might have for accumulating money, yet said money went to him as treasurer of the Greek Catholic Union and was deposited by him according to the terms of the By-laws which had already been put in evidence.

The Court: I can't see that it makes any difference what the money was ultimately to be used for.

[fol. 186] Mr. Brown: Mr. Davis has brought out in this case, in chief, and probably wanted to go to the Jury, that whether this treasurer accumulated more money than was necessary for the ordinary requirements of the society he was permitted to have under the By-laws not over the $25,000.00 more than necessary to the ordinary requirements. The offer here is to show that the requirements of money at that time were very largely increased due to this large building operation involving several hundred thousand dollars, and in anticipation of the convention there were very large payments being made daily of back dues that had accumulated over a period of three years, back dues were being paid in, so that there was an unusual accumulation here at this time which was not——

The Court: A large accumulation of course.

Mr. Hoehrle: The whole charge is large accumulation, more than $25,000.00.

The Court: These By-laws are exceedingly puzzling to me as to just what they do mean and what the scope of them is.

Mr. Hoehrle: I don't know what they mean in the original, but in the translation of them I——

The Court: They seem to have several contradictory fea-

[fol. 187] tures. I think I will allow that one motion; exception to Mr. Davis. As to the general exception as to whether or not they were unusually large at this time, just simply to show that it was due to an inauguration of building of an orphanage later.

Mr. Hoehrle: And the payment of back dues. These local lodges let their dues become delinquent, and then the whole assembly go on a campaign and collect these back dues. This was just before the convention and the campaign was on.

(End of side bar.)

Mr. Hoehrle:

Q. Just prior to the 7th of April, 1924 was there any unusually large accumulation of Union funds in your hands?

A. It was.

Q. And, without going into particulars, Mr. Kondor, generally speaking, was because of that unusually large——

A. The convention was coming along; had balances, didn't pay for months or so; supposed to send all dues; in other words otherwise wouldn't be able to have a delegate.

Q. Was the Union collecting funds with which to erect buildings and so forth?

A. No, wasn't.

Q. Just this accumulation on account of the convention?

A. Every two years.

Mr. Davis: Every three years.

[fol. 188] A. Then was two years.

Mr. Hoehrle:

Q. Mr. Kondor, did you consider the Peoples State Bank a safe one?

A. I do.

Q. And did you consider it safe on the 7th day of April, 1924?

A. That was the day they closed us up. Well, I considered it safe, but it was closed.

Q. Thinks it was safe enough after it was closed?

A. It was no more Peoples State Bank.

Q. But just prior to the visits of the Banking Department officials and the Directors of the Greek Catholic Union had you considered that bank in a safe condition?

A. I do.

Cross-examination.

Mr. Davis:

Q. You were one of the original men that formed this bank?

A. I don't get you.

Q. Were you in this bank when it was first started?

A. I was.

Q. Elected president of the bank when it was first started?

A. I was.

Q. You and Mr. Cooney were closely associated at all times in this bank?

A. I was.

Q. Served as president?

A. Yes, sir.

[fol. 189] Q. Director?

A. Yes.

Q. Met with the discount committee?

A. Yes, for a while.

Q. Met with the discount committee every month?

A. Yes.

Q. You were in the bank every day?

A. I wouldn't say every day.

Q. As Director of the Greek Catholic Union every day?

A. Pretty near every day.

Q. When you got sick did you have rheumatism?

A. Rheumatism.

Q. Any in your head? Where was it, in the foot?

A. In my knee.

Q. Otherwise you were all right?

A. Yes.

Q. Used a cane to get around?

A. I couldn't get out of bed for a week.

Q. When were you down in Harrisburg with relation to the bank?

A. I was.

Q. How many times?

A. I remember I was down once.

Q. Once only? Whom did you see then?

A. The Banking Department.

Q. Who was that you saw at the Banking Department?

A. Mr. Phillips was down there as one of the bank, — Mr. Phillips and Mr. Cooney.

[fol. 190] Q. Mr. Paul?

A. I think so.

Q. At that time was the delinquent payment the general discussion?

A. Criticism on loans, yes.

Q. Were the general conditions of the bank gone into?

A. I don't remember.

Q. Criticised on loans?

A. Got some paper on there, weren't any good.

Q. When was this that you were down at Harrisburg?

A. I couldn't tell you.

Q. Do you remember when Mr. Phillips made his examination around about January 15, 1924, was it before that that you were in Harrisburg?

A. I believe after that.

Q. After that. You remember getting a letter from Harrisburg sent to you as president of the bank in response to the examination that Mr. Phillips made, and to the report that he filed in Harrisburg?

A. I don't remember.

Q. Didn't you get a letter from him?

A. I don't remember, Mr. Davis.

Q. Don't you remember getting a letter in which the condition of this bank was particularly called to your attention as to loans?

A. Mr. Davis, I resigned from the Directors of the Peoples State Bank the first of the year; I don't go to hardly any meetings after that.

Q. You knew what the condition of the bank was?

A. I don't attend the meetings after that.

[fol. 191] Q. You say you attempted to resign?

A. I don't know, Mr. Davis, I don't understand banking business; I left it all to Mr. Cooney.

Q. You knew how much money you had borrowed?

A. I don't know.

Q. You knew how much you and Mr. Cooney together had borrowed, you heard him reading here yesterday?

A. Sure.

Q. You didn't know before yesterday?

A. I don't know the exact amount; I know there was some loans there.

Q. Who was the Woodville Drug Company?

A. That was a corporation.

Q. Who were interested in that?

A. Mr. Borack from Scranton and Mr. Matt Mawridge from Johnstown.

Q. Were you interested in that?

A. I was, you know it, Mr. Davis.

Q. What did the Banking Department in Harrisburg say to you in regard to the combined loans of John H. Cooney and George Kondor amounting to $75,636.00.

A. In answer to that, Mr. Davis, I can't tell you what they said. I don't take part in the business at all. I was there in the name as president.

Q. You were there in the name as president, didn't talk business? When you were asked to go to Harrisburg on account of the condition of the bank, as president, didn't you think there was something wrong? Didn't you think there must be something wrong with the bank?

A. Something wrong with certain paper but not with [fol. 192] the bank; the bank had resources underwriting to prove. Established as good as any bank established around that city.

Q. What other banks around there?

A. Commonwealth Deposit Bank.

Q. What other banks were you interested in?

A. Pennsylvania Trust, the coal companies broke that up.

Q. Were you on the Board of Directors of that other bank?

A. Pennsylvania Trust?

Q. Yes.

A. For about two weeks with that organization; I was on the Board of that; I quit.

Q. Why?

A. Didn't like to serve.

Q. Why?

A. Didn't just feel that way.

Q. Something wrong with that bank too?

A. I don't know.

Q. Isn't that the reason that you resigned from that bank because you examined and found it——

A. I had too much other work.

Q. Do you remember Mr. Phillips coming around?

A. Yes.

Q. Had talks with him?

A. Yes.

Q. You, as president of the bank, talked to Mr. Phillips, didn't you?

A. Yes.

Q. Didn't he tell you the condition of the bank, about this paper, no interest being paid?

[fol. 193] A. I don't remember talking of the condition of the bank.

Q. You didn't talk to Mr. Phillips about the condition of this bank at all?

A. Mr. Phillips was there and he told me some papers got to be took out and wasn't good; I told him, call a Board of Directors, talk to Mr. Cooney and see what could be done.

Q. Why did he want you to take those papers out?

A. Didn't think much good.

Q. Did you call the Board of Directors?

A. I got the cashier to call the——

Q. Then did you take up this matter, you were there?

A. Sometimes.

Q. At the time you were there, were these papers discussed?

A. I believe I was there only once.

Q. Only once, when was that?

A. Around February.

Q. Around February, first of February?

A. Can't remember.

Q. How many times did you talk to Mr. Phillips about this condition of this bank?

A. I couldn't answer that question.

Q. Didn't you think there was something wrong at the bank in regard to this paper?

A. There was some agreement; want us to take care of.

Q. All right, how much of that paper did they criticise?

A. I don't know.

[fol. 194] Q. You don't remember now?

A. (No audible response).

Q. Did they criticise your loans there?

A. I believe they did.

Q. Did they criticise Mr. Cooney's loans?

A. I believe they did.

Q. Did they criticise the Navy Smokeless Coal Company?

A. I don't remember.

Q. Didn't you remember them criticising the $25,000.00 to that company you had loaned them?

A. I don't remember.

Q. You don't remember, do you remember anything about the H. C. Cook Coal Company?

A. That was one of the directors of the bank.

Q. He was one of the directors of the bank too? Was his paper criticised?

A. To tell you the truth, I don't remember.

Q. You don't remember? What about Mr. Fry and Mr. Custer, were they directors of the bank? Do you remember about their paper being criticised?

A. Mr. Custer and Mr. Fry? Did hear something about Mr. Fry; didn't hear anything about Mr. Custer.

Q. What about the loan of $4,000.00 to the Purity Drug Co.?

A. Don't know.

Q. What interest did Mr. Fry and Mr. Custer have in the Purity Drug Company?

A. I don't know.

Q. Don't know anything about them?

A. If I did, I would tell you.

[fol. 195] Q. You were a member of the discount committee?

A. Was for awhile.

Q. Did you ever talk to Mr. Cherry about the condition of the bank?

A. Well, Mr. Cherry knew the condition of the bank just the same as I did.

Q. He knew just the same as you did?

A. Mr. Cherry is in banking the same as I was.

Q. Did you hear Mr. Cherry testify yesterday?

A. He was on the stand, I didn't hear him testify, probably I was out.

Q. Did you hear him testify he didn't think the bank was a safe bank?

A. Probably I was out.

Q. Did you ever talk to anybody about the deposits of the Greek Catholic Union in this bank outside of the members of the Greek Catholic Union?

A. Did I ever talk to them?

Q. Yes.

A. About the deposits of the Greek Catholic Union?

Q. Yes.

A. I don't remember.

Q. Did you ever talk to Mr. Cooney about this large sum of money that you were depositing in this Peoples State Bank?

A. To Mr. Cooney?

Q. Yes.

A. Sure.

[fol. 196] Q. Did you ever ask any person whether they thought it was wise to deposit any such sum of money in that bank?

A. Don't get that question.

Q. Do you think it was proper for you to deposit a sum of money that of the Greek Catholic Union in a bank of $50,000.00 in which the paper was being questioned by the Banking Department?

A. I think it was safe.

Q. You think it was advisable for you to make such a deposit as you had in the Peoples State Bank?

A. I think it was.

Q. Who did you talk to about that; did you talk to any banking man about that?

A. Mr. Cooney.

Q. You talked to Cooney about that?

A. Yes.

Q. Wasn't it your intention, Mr. Kondor, to deposit this money of the Greek Catholic Union in the Peoples Bank so that you could keep the Peoples Bank running?

A. No.

Q. Didn't you know, Kondor, that if you didn't deposit money in the Peoples State Bank during January, February and March of 1924, and the withdrawals were made by the officers of the Greek Catholic Union, that your bank could not pay them and could not carry along?

A. If I wouldn't deposit that money for three months?

Q. Yes.

A. Of course, if I make deposit the Greek Catholic money [fol. 197] in the bank the check was not in, it would be questioned.

Q. In other words, you hadn't deposited this money that you got?

A. Mr. Davis, in three months they accumulated $300,000.00 and their business go on; if I don't deposit that money, how would you expect to pay those checks.

Q. Mr. Kondor, in January you had $132,000.00 of the Greek Catholic Union money on deposit in the Peoples State Bank?

A. Whatever it showed.

Q. If the Greek Catholic Union had drawn its check on that $132,000.00 and you had not deposited any other money except what you got from the Greek Catholic Union during January, February and March, your bank would have closed, wouldn't it? Answer that yes or no?

A. I couldn't understand your question. If the Greek Catholic Union would deposit and would draw it would be foreclosed?

Q. If the Greek Catholic Union didn't deposit and they drew what would have happened?

A. How could they draw?

Q. They had $132,000.00 in there, didn't they, to start with in January?

A. Whatever the books show it was.

Q. All right, the books show $132,000.00.

A. Mr. Davis, I tell you if the Greek Catholic Union got its money on that, business would have gone on just the same, if it hadn't been for a few bad loans that the coal company had in.

Q. Didn't you know the only way that you could keep [fol. 198] that bank going was to deposit this money that was being deposited by the Greek Catholic Union and to you as treasurer, and deposit in the Peoples State Bank?

A. No, sir.

Q. Wasn't that your only reason for keeping that large sum of money in the Peoples State Bank?

A. Mr. Davis, two years before this they were talking about bringing that amount down to the limit of the By-laws because the convention was coming and we wanted it down where the By-laws called for.

Q. That was two years before?

A. Two years before, from 1916-17 up to the last time. That wasn't just an effort to keep that bank going.

Q. If it wasn't for the sum of the Greek Catholic Union, your bank wouldn't have lasted very long?

A. I tell you not; no.

Q. No.

A. No, you understand what I mean; I say no, that is it what you say.

Q. How much stock did you have in the bank?
A. Two hundred and ninety-four shares.
Q. Out of a total of how many shares?
A. One thousand shares.
Q. That is all.

Redirect examination.

Mr. Hoehrle:

Q. Following your conversation in January with the Banking Department, did you or other directors of the [fol. 199] bank pay any money into the reserve?
A. Well, the Banking Department called us for $21,000.00 and we made that up.
Q. You put in $21,000.00 extra money?
A. Sure.
Q. That is all

Recross-examination.

Mr. Davis:

Q. Wait a minute; you say in January the directors of your bank paid $21,000.00 into the bank?
A. I believe it was January.
Q. Why?
A. 1924.
Q. Why?
A. Account of some bad loans.
Q. On account of unsafe condition of your bank?
A. Account of loans, not unsafe condition. They told us it was unsafe.

Redirect examination.

Mr. Hoehrle:

Q. If they had told you it was unsafe would you have paid a cent?

Mr. Davis: Object.
The Court: It is somewhat speculative.
Q. To pay that money in the bank, wasn't it necessary [fol. 200] for your wife to pay some of that money of hers?

Mr. Davis: Object to.

The Court: I wouldn't like to argue, there are a good many contingencies that are apt to arise.

Q. All right, that is all.

ANNA BULLOG, a witness produced on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

Mr. Hoehrlee:

Q. Where do you live, Miss Bullog?

A. Conemaugh, Pa.

Q. Do you know George Kondor?

A. Yes, sir.

Q. How long have you known him?

A. About ten years, at *yeast*.

Q. Were you employed by him while he was treasurer of the Greek Catholic Union?

A. I was.

Q. In what capacity?

A. Secretary.

Q. And for how long?

A. At least three years, a little over, I think.

Q. What were your duties Miss Bullog, as his secretary?

A. I opened all the mail, assorted it, made deposits and [fol. 201] sent out receipts to the respective lodges that is, sending money.

Q. As mail came to you in the form of checks and money orders from local societies of the Greek Catholic Union

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A. I OK'd them and made deposits.

Q. Were they first endorsed by Mr. Kondor as treasurer?

A. Yes, sir.

Q. Did you get all mail that contained checks that go out after they were signed by him?

A. I sent out all mail that was signed and ready to be sent out.

Q. Did you receive all that mail that came to him as treasurer?

A. Yes.

Q. Did you deposit all the moneys that came to him, checks?

A. I made out all the deposits.

Q. You did that promptly?

A. Yes.

Q. Did you send reports to the supreme officers?

A. Yes, sir.

Q. What did that report consist of?

A. Total amount received by Mr. Kondor, total amount received during the month.

Q. Did you send any statement from the bank of the balance on hand?

A. I don't think I did; I think the bank sent it direct; they always gave us a copy.

Q. The checks that came in signed by Mr. Kondor, or to be signed, were they sent out promptly?

[fol. 202] A. He himself signed them and gave them to me and I sent them out.

Q. Do you know anything about any checks found in his desk on April 7th when the United States Trust Company took over the Peoples State Bank?

A. No, I don't.

Q. Did the auditors come to his office and audit the books?

A. No, I think the books were taken down to Homestead to be audited.

Q. While you were there, were there any audits in which were found any of Mr. Kondor's figures were incorrect?

Mr. Davis: Object to, no charge of any kind there; no discrepancies along that line at all; altogether——

The Court: Oh well, of course that is——

Q. Do you remember whether or not Mr. Kondor was ill just prior to the time the United States Trust Company took over the Peoples?

A. He was ill, I couldn't say just the time; he had been ill different times.

Mr. Davis: No cross examination.

[fol. 203] RICHARD E. BENHAM, a witness produced on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

Mr. Hoehrle:

Q. Where do you live, Mr. Benham?
A. I live now in Ardmore, Pa., that is near Philadelphia.
Q. Where did you live in April 1924?
A. In Bellevue.
Q. Were you, at that time, employed by the American Surety Company?
A. I was.
Q. In what capacity?
A. Manager of the Pittsburgh office.
Q. Did you have any other title in connection with your work here in the Pittsburgh office?
A. Oh yes, I had the title of resident vice-president which was simply a title of facility to enable us to sign bonds.
Q. How many in your office had that title, do you know?
A. Oh, probably ten or twelve.
Q. Clerks and others?
A. Yes.
Q. Did you hold any other title for that purpose?
A. No other title.
Q. What is the title of resident assistant secretary?
A. That is an attest officer to attest the signature of the resident vice-president. I also had that title.
[fol. 204] Q. For the purpose of attesting bonds?
A. For the purpose of attesting bonds.
Q. That title I believe was also held by a number of persons in the office?
A. Yes, sir.
Q. Both titles held by persons in the office?
A. Yes, sir.
Q. As resident vice-president or resident assistant secretary did you have any executive duties?
A. No, sir.
Q. Had you any responsibility?
A. No, no responsibility, simply a title to sign bonds.
Q. You may state that is if any accounts which you took were subject to approval by the home office?

A. Why all the bonds we wrote over a small limit had to be approved by the home office in New York.

Q. On or about April 6, 1924, did you have any conversation over the telephone with Mr. Davis representing the Greek Catholic Union?

A. I did, one Sunday morning about half past two.

Q. Will you just tell the Court and Jury what that conversation was and what was said?

A. Why, Mr. Davis called me from Johnstown at my home that he was down there in connection with some trouble that the Greek Catholic Union was having with the Peoples State Bank in Conemaugh. First I had heard of it. Unless there was a deposit of $100,000.00 by nine o'clock Monday morning the bank would not be allowed to [fol. 205] open. Asked me is there was any way I, or the American Surety Company, could help out. I told him I was sorry if the Greek Catholic Union was in trouble. He knew the request made of me was absolutely outside of my jurisdiction. I had no authority to act for the company in that way at all. I added there was no man in the organization that had authority to sign a check for $100,-00.00; if there was, the only man I could think of was the president of the company.

Q. Who was that?

A. Mr. F. W. La Frentz.

Q. Did you give him Mr. La Frentz' name?

A. I think not.

Q. Was that all the conversation?

A. He asked me who had charge of claims in the New York office. I told him a Mr. B. J. McGinn had charge of claims. He asked me where he could get hold of B. J. McGinn. I told him I didn't know where he lived or what his telephone was.

Q. Did you have any other conversation with Mr. Davis?

A. Well, at that time he told me they had some plan of one of the banks of Johnstown helping out by taking over this bank but I didn't get the "drift" of it, and said that he would call me again later. I asked him not to because there was nothing I could do; but he did call—

Q. Four o'clock that same morning?

A. Four o'clock that same morning; told me the plan whereby the Johnstown bank was to help them out on this, all had gone through and that he saved us $100,000.00.

I told him of course, that is his plan not mine. I didn't know anything about it.

[fol. 206] Cross-examination.

Mr. Davis:

Q. You say the first time I called you was early Sunday?
A. Yes, sir, about two-thirty I think.
Q. About two-thirty. Didn't I call you on Monday morning about four o'clock after I got back from Johnstown and tell you then that we had made this arrangement whereby we thought we would be able to save the American Surety Company from putting up $100,000.00?
A. No, Sunday morning.
Q. The United States Trust Company didn't get into this picture until Sunday night?
A. You didn't call me, only Sunday morning.
Q. Didn't I call you at four o'clock Monday morning?
A. No, sir.
Q. I told you about the arrangements of the United States Trust Company saving the American Surety Company from putting up $100,000.00?
A. I don't know what the name of the bank was, some plan to carry this thing over.
Q. That that plan had been agreed upon?
A. Yes.
Q. Didn't I tell you that it was to relieve you of the worry that I called you up?
A. Yes, the same morning.
Q. You told me Mr. McGinn had charge of the Claim Department?
A. I told you Mr. McGinn had charge of the Claim Department.
Q. And that you couldn't do anything, notwithstanding [fol. 207] you were the resident manager of the Pittsburgh office?
A. Yes, you knew that.
Q. Had better get in touch with somebody in New York?
A. Yes.
Q. You admitted nothing that you could do?
A. Yes.
Q. I suggested the American Surety Company were

very much interested in this and maybe they could do something?

A. I presume so, that is what you called me for.

Q. You are the man I believe that signed this bond on which this suit is brought?

A. No, I think not.

(Witness temporarily withdrawn.)

BERNARD J. MCGINN, a witness produced on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

Mr. Hoehrle:

(Witness gave reporter his name and address as follows: Bernard J. McGinn, 15118 84th Row, Jamaica, New York.)

Q. Mr. McGinn, are you connected now with the American Surety Company of New York?

A. Yes, sir.

Q. Were you in April, 1924?

A. Yes, sir.

Q. What was your position in April 1924?

[fol. 208] A. Manager of the Claim Department.

Q. Did you on or about the 6th of April 1924 have any conversation by telephone with Mr. Davis, who then represented the Greek Catholic Union?

A. I couldn't remember that I did, sir.

Q. Did you have any conversation with any one with regard to the Greek Catholic Union?

A. Yes, sir.

Q. Who was that?

A. Mr. James F. Priest who was then our inspector here in Pittsburgh.

Q. You had no conversation with Mr. Davis?

A. I don't recall it.

Q. Would you recall if you had?

A. Pretty sure that I would.

Q. As manager of the Claim Department had you any authority in settlement of claims?

A. A limited authority.

Q. How much?

A. Up to about $5,000.00.

Q. It has been stipulated that Mr. Davis, put on the stand, would have testified that he had conversation with you with regard to the situation at Johnstown wherein the affairs of the Peoples State Bank were involved, and a deposit of the Greek Catholic Union for whose treasurer, Kondor, your company was surety. Do you recollect any conversation with anyone with regard to that?

A. Except with Mr. Priest over the telephone.

Q. Where was Mr. Priest, do you know?

A. I think he was telephoning from the Pittsburgh branch office.

[fol. 209] Q. Do you have any recollection of any conversation with Mr. Davis?

A. None.

Cross-examination.

Mr. Davis:

Q. When was that conversation?

A. With Mr. Priest?

Q. Yes.

A. About eight o'clock Sunday morning.

Q. Mr. Priest is one of the managers of your company?

A. No, sir, he was not.

Q. Was he a resident vice-president?

A. He may have been at that, I don't know; he was the inspector; he was my employee.

Q. How did he get this knowledge?

A. Mr. Benham told him.

Q. Did Mr. Benham state that he had gotten his information from me?

A. I don't know what he told him.

Q. Didn't Mr. Priest tell you?

A. Tell me what?

Q. About this situation up in Johnstown?

A. Yes.

Q. What was your answer to him?

A. Priest told me that it was going to be necessary to put up $100,000.00 on Monday morning before banking hours, otherwise the Peoples Trust Company or some-

thing of that sort, in Johnstown, couldn't open. I said "Jimmie, you know I haven't got any authority to decide on that; that cannot be decided until after the finance [fol. 210] committee meets," which would be Tuesday morning about eleven-thirty.

Q. There isn't anything the American Surety Company could have done until Tuesday morning?

A. In regard to putting up $100,000.00.

Q. Nobody in the American Surety Company could have taken any action in regard to putting up $100,000.00.

A. No.

(Adjourned until 10:00 o'clock A. M., Thursday, May 8, 1930.)

Morning Session

Thursday, May 8, 1930.

OFFERS IN EVIDENCE

Mr. Arthur: If the Court please, counsel for defendant offers in evidence portion of Section 30 of the Constitution and By-laws of the Greek Catholic Union in force in April, 1924, as follows:

"30. Financial Secretary and His Duties.—

"(1) The Financial Secretary has right, duty and responsibility of one authority, in respect to all financial matters of the Union.

"(2) He sends out assessments, and keeps record of all receipts and disbursements.

"(3) Every thirty days he notifies all the lodges whose accounts are in arrears.

"(4) Every month he publishes a monthly statement, approved by the President of Supreme Auditors in the official organ, showing the financial standing of the Treasury.

[fol. 211] "(5) Before the Convention he prepares a two-year detailed sworn and printed report of all transactions in the Union, which he submits to the Convention; and

a similar Annual Report to the meeting of the Supreme Assembly.

"(6) With the President of the Union he signs all letters and documents concerning financial matters.

* * * * * * *

"(8) The Financial Secretary draws monthly checks for payment of legal death and cripple benefits, and other miscellaneous expenditures, and submits the same, together with documents, to the Supreme President and Supreme Treasurer, for their approval and signature; he also sends a statement of all checks to the President of the Auditors.

"(9) If the Supreme President were to require the Supreme Financial Secretary to draw warrants for the payment of such expenditures which he doubts as being legal he may refuse to draw the warrant in which case the President of the Auditors decides.

* * * * * * *

"(15) At the end of each month he sends a report of all receipts and disbursements with invoices and other documents to the President of the Auditors."

Mr. Davis: I would like to have defendant's counsel, if he will, identify that paragraph as relating to the testimony of George Komlos, the witness who was called by the [fol. 212] plaintiff, and testified that he was the Supreme Financial Secretary at that time. If he will identify that, I have no objection to its going in.

The Court: It is in evidence as showing what the scope of his powers was. If there is no objection to it, it will be received.

Mr. Arthur: If the Court please, I offer in evidence paper marked Exhibit No. 2, being the agreement of April 7, 1924, between the Peoples State Bank and United States Trust Company of Johnstown, for the taking over of the Peoples State Bank by the Trust Company.

Mr. Davis: That is objected to as being incompetent, irrelevant and immaterial, no objection being made as to the execution of the agreement and so forth, because that was agreed upon—the identification of the agreement.

We admit that is the agreement it purports to be, but it is objected to, first, as not being a matter of defense, there being nothing set forth in the pleadings by the defendant relating to this agreement; second, that the agreement between the United States Trust Company and the Peoples Bank is a collateral matter, and does not affect in any way the agreement between the United States Trust Company and the Greek Catholic Union; third, the defendant is not a party to this agreement, Exhibit No. 2, of defendant; [fol. 213] fourth, there has been no evidence produced by the defendant or an offer to produce any evidence, under which this agreement could be made or used as a defense to the claim of the plaintiff herein.

The Court: What is the purpose of it?

Mr. Arthur: Mr. Jendries, on the witness stand, testified for the plaintiff concerning certain of the details of this transfer. Among other things, he said the consideration for the transfer was one dollar. This agreement shows what the actual consideration was, and is offered in connection with the testimony of Mr. Jendries, and for the purpose of contradicting Mr. Jendries' statement as to the consideration for the transfer, and to show what the actual conditions of the transfer were. It has to do also with one of the conditions of the bond. One of the conditions of the bond provides for failure of the depository. This agreement is offered as evidence that there was no failure of the depository, that the obligations of the depository were all underwritten by the United States Trust Company of Johnstown.

Mr. Davis: If your Honor please, that is practically admitted. There is no dispute regarding that.

Mr. Hoehrle: I believe there is another reason. It is questioned throughout this case as to whether or not the [fol. 214] State Bank was a safe bank. If the United States Trust Company takes over all the assets of the State Bank and obligates itself to pay all the liabilities, surely it is an item of evidence to go to the jury on that question.

The Court: We will allow you to offer it, and note an exception to the plaintiff, although it really does not contradict the testimony.

Mr. Arthur: Now, if your Honor please, there is just one other thing: the stipulation which was filed yesterday

was a flat stipulation that such and such were the facts. I would like to have that stipulation read that Mr. Davis would have so testified if he had been on the stand, without prejudice to his right to participate in the case, for the reason that there may be some minor inconsistencies between that stipulation as a stipulation of fact and the testimony of Messrs. Benham and McGinn. I don't know that it is material, but I do not want to be embarrassed later by a stipulation of fact which may be inconsistent in minor particulars with the testimony of my witnesses.

Mr. Davis: I haven't any objection to agreeing with Mr. Arthur, but any inconsistencies between that stipulation, as filed, and the witnesses produced by him, as defendant's counsel, may be taken and considered by the jury, and may be taken and considered at any other time [fol. 215] afterwards.

The Court: If you have no objection, it will be understood that the stipulation shall be modified by the reporter so it shall be made to appear it is a stipulation that Mr. Davis, if called to the stand, would have testified thus and so, rather than a stipulation of the facts. Under that stipulation, of course, it will be as though he had testified.

Defendant rests.

Testimony closed.

Mr. Brown: If your Honor please, we object to all the points of defendant.

The Court: What is your objection to the second point?

Mr. Brown: We believe it is not a true statement of the law.

The Court: I will take it under advisement.

Mr. Arthur: The points to which we have our chief objection begin with the eighth point. Our contention there is that there has been a substantial change; there has been not only a change but a substitution of an entirely new risk.

[fol. 216] (Mr. Hoehrle and Mr. Magee address the jury on behalf of defendant.)

(Mr. Davis addresses the jury on behalf of the plaintiff.)

PLAINTIFF'S EXHIBIT "B"

Copy

Report

Etna, Pa., January 24, 1924.

Hon. Peter G. Cameron, Secretary of Banking, Harrisburg, Penna.

DEAR SIR: The following report of an examination of the Peoples State Bank of Johnstown, Johnstown, Pa. as of the close of business January 15, 1924, is herewith submitted.

The within report is supplemental to one dated January 21, 1924, which was previously forwarded to the Department. In the "preliminary" report referred to, attention was called to the following matters of importance.

Condition of Reserve on date of examination.

Large withdrawals of deposits since January 1st.

Unsafe distribution of demand deposits.

Anticipated withdrawals of Greek Catholic Union deposits.

Non-liquid condition of institution.

Deficit in Earnings.

Impairment of Capital.

[fol. 217] Cash.—Cash on hand was found to be $30.00 long of the amount called for by the general ledger. In this connection attention is called to the fact that although an "over and short" account is carried in the general ledger, various cash discrepancies have been adjusted during the past year through the use of other general ledger accounts. This practice should be corrected.

Cash Items,—Checks:

E. R. Cherry, Cashier,	N. S. F.	$23.95
D. R. Schnabel,	Do.	417.00
John Kosty,	Do.	142.20
W. E. Smith, Treas. Franklin Boro.	Do.	8.00
M. McLaughlin,	Do.	6.45
C. F. Wilson, dated 10/19/23,—returned		100.00
G. S. Klingensmith, 12/3/23, end. B. H. Luttringer,	Do.	802.30
Various,—recent,	Do.	162.50
Memos:		
John Sember (not dated but old)	Balance	100.00
Faulty Money Order		10.00
Total		$1,772.40

The first three items in the above list were removed during examination. The C. F. Wilson amount of $100.00 is appraised as a loss. B. H. Luttringer, the endorser of a check carried at $802.30, is a director of this Bank. Mr. Luttringer promised that this item would be lifted within the next few days. The John Sember item of $100.00 rep- [fol. 218] resents a balance due on account of an N. S. F. check paid by this Bank. It has been reduced to its present carrying value through payments made on account of same by his daughter, Miss Mary Sember, who is employed as teller and book-keeper by the Bank. While no loss is appraised in its connection at this time, it is recommended that the Sember item be either collected or charged off. Miss Sember is a borrower from this Bank on her single name note to the extent of $115.00. The various other cash items carried do not appear to require special mention. They should, however, be removed without delay.

In this connection mention is here made that no permanent record of either cash items or overdrafts are kept. Both of these matters were called to the attention of the Cashier who was also informed that the institution would be required to keep a permanent record of its daily computations of reserve.

Reserve—Demand liabilities, cash, 3.16%.
Demand liabilities, agents, 7.84%.
Time liabilities, agents, none.
Cash Reserve was $3,875.79 short.
Total amount of Reserve was $21,028.55 short.

Both the condition which appears to have caused the Reserve amounts to fall below legal requirements and the action taken to restore same during examination were fully explained in the "preliminary" report. In order that this Bank may be in a position to safely take care of anticipated large withdrawals of funds of the Greek Catholic Union between now and July 1st, it will be necessary that its Re- [fol. 219] serve be built up to an amount greatly in excess of that required by law. Having this in mind, your examiner instructed the Cashier and various directors interviewed during examination that not only should no new loans be made in their present condition, but that strenuous efforts should also be made to liquidate the loans now carried as quickly as possible.

Loans:

Bills Discounted	$195,107.30
Loans on Call	24,583.30
Time Collateral	36,815.00
Demand Collateral	53,266.00
	$309,771.60

All loans and discounts are carried in one general ledger account, a practice which is poor and should be corrected. A trial balance taken from the notes showed their total amount to agree with that called for by the general ledger.

Past-due Bills Discounted:

Jos. Woykoczky, & Emma Woykoczky	$2,015.00	3/ 4/23
Jos. Seman (5 notes)	3,680.00	June 23
Wm. R. Fry, end. Eph. J. Custer	2,100.00	6/28/23
Jas. R. Custer, end. Eph J. Custer	1,900.00	7/ 1/23
Davis-Long Coal Co. end. T. Stanton Davis	3,000.00	7/ 2/23
J. A. Boney, end. T. Stonton Davis	750.00	7/ 2/23
[fol. 220] Navy Smokeless Coal Company (8 notes)	25,000.00	July 22
W. E. Wissinger, end. Edw. Custer	500.00	11/ 8/23
Ralph Savering	395.00	11/10/23
A. B. Curry, end. W. E. Smith	500.00	12/ 2/23
General Board of Trustees of N. A. Archdiocese of the Russian Orth. G. C. Church	700.00	12/31/23
Purity Drug Co. end. W. R. Fry & Edw. Custer	2,000.00	1/ 1/24
Johnstown Prtg. & Lith. Co. end. John H. Cooney & B. H. Littringer	2,775.00	1/14/24
John Brisovec, end. John Pike	3,625.00	1/15/24
Jos. Vivoda, end. John Pike	3,625.00	1/15/24
Various makers (7 notes)	1,055.00	Jan. 24
Total	$53,620.30	

Memo.—Interest on the two notes endorsed by T. Stanton Davis is paid to January 1, 1924, and that on the various notes of the Navy Smokeless Coal Company, aggregating $25,000.00 and which are entered of record, is paid to July 1, 1923.

Jos. Woykoczky & Emma Woykoczky, $2,100.00.—This note is not collectible and is appraised as a loss. Mr. George Kondor, President of this Bank, Mr. Frank H. Goebert, former Cashier, and Mr. Jos. Seman, former Manager of the Bank's Foreign Department, appear to have been the parties who benefited through the "Woykoczky" loan inas-
[fol. 221] much as the proceeds of same represented a portion of the purchase price paid by the Woykoczkys to Messrs. Kondor, Goebert, and Seman for a Pool Room and Bowling Alley equipment and business which they owned as partners and operated as the "Cambria Bowling Alley." Various other transactions handled through and by this Bank in connection with the Pool Room and Bowling Alley deserve mention and will be here referred to.

In order to provide for the payment of a commission to a Real Estate Agent for making the above mentioned sale, the parties referred to borrowed from this Bank the sum of $500.00, the said loan being represented by a note for that amount made payable by the Cambria Bowling Alley and endorsed by Messrs. Kondor, Goebert, and Seman. This loan has since been reduced to and is now carried at $410.00, the same being represented by a note of which Mr. George Kondor and Mr. Frank H. Goebert are joint makers. The amount of $410.00 is charged against the line of credit extended to Mr. Kondor which will be later referred to.

In the month of March 1923, the Pool Room and Bowling Alley equipment appears to have been purchased at a Constable's Sale for $350.00 by Mr. Goebert for the Bank, a charge for that amount being made to the Bank's Expense account on March 26, 1923.

On March 28, 1923 an account was opened in the Bank's individual ledger in the name of "Bowling Alley, Peoples State Bank," against which account items of expense in-
[fol. 222] curred in connection with the operation of the business were charged and items of income derived therefrom, were credited. On June 5, 1923 the account referred to shows an overdraft of $396.33, which was later reduced to $326.85 at which amount it is now carried. The overdraft of $326.85 is for the purpose of this report appraised as a loss.

During the six month- ending December 31, 1923, a total amount of $805.00 representing the cost of seven months

rent for the quarters occupied by the Pool Room and Bowling Alley, was paid by the Bank and charged against its Expense account. This item of expense has recently been eliminated through the removal of the equipment to a building owned by Mr. John H. Stephens, one of the Bank's directors.

The items already charged to Expense together with the overdraw which is appraised as a loss represent a total amount of expense or loss which has been incurred by this Bank as the result of the taking over of the Pool Room and Bowling Alley equipment, of $1,481.85.

It is thought that not more than $500.00 could be realized from a sale of the equipment referred to. This item is not carried as an asset on the Bank's books and will not be considered in the appraisement of assets made for the purpose of this report.

It appears to be the purpose of the directors of this Bank to attempt to have Mr. Kondor reimburse the institution for any loss suffered by it in connection with the various Bowling Alley transactions, including the original Woykoczky loan.

[fol. 223] Jos. Seman, $3,680.00.—Mr. Seman, while employed as Manager of this Bank's Foreign Department, embezzled funds belonging to this institution and is now confined in the Cambria County jail. His sundry loans aggregating $3,680.00 are appraised as losses and should be charged off.

It will be recalled that no loss was suffered by the Bank as a result of Mr. Seman's shortage, the full amount of same having been made good by the directors. In this connection mention is made that no settlement of this Bank's claim has yet been made by the Bonding Company. Neither has the automobile turned over by Mr. Seman been disposed of.

Ralph Savering, $395.30.—This item is regarded as a doubtful as well as a slow asset for the reason that no information was obtainable regarding its maker.

Russian Orth. G. C. Church, $700.00.—This loan was reduced a total amount of $100.00 during the past year. While claimed to be safe, it will likely continue to prove slow. It is, however, receiving better attention than in former years.

John Brisovec, $3,625, Jos. Vivoda, $3,625.00.—Both of these notes matured on date of examination. Each has been reduced $1,025.00 since the examination made of this Bank in January, 1923. These notes are endorsed by John Pike who is thought to be the real borrower. Mr. Pike is a Jeweler, located in Conemaugh. A financial statement on file, dated November 15, 1922, showed the following amounts. Total Assets, $79,665.00. Total Liabilities, [fol. 224] $23,300.00. Net Worth, $56,365.00. While these loans may be safe enough, their total amount is in excess of ten per cent of this Bank's combined Capital and Surplus. They should be reduced to come within that amount.

Various other important as well as doubtful loans contained in the "Past Due" list will be considered later in this report in connection with other loans to the same parties.

Demand Loans in Arrears for Interest

Navy Smokeless Coal Company	$1,598.30	6/ 1/23
F. H. Goebert & Geo. Kondor	410.00	7/ 2/23
C. H. McMullen	300.00	7/12/23
I. D. Ford	2,000.00	7/17/23
H. F. Confer	800.00	7/19/23
C. F. Wilson	2,400.00	8/ 7/23
C. F. Wilson	1,750.00	8/13/23
C. H. McMullen	1,500.00	8/23/23
Estate of H. B. Cooney	3,500.00	8/26/23
J. T. Cooney Estate	3,000.00	9/ 9/23

While none of the above loans are badly in arrears for interest, it appears that an effort should have been made to collect a large part, if not all, of the interest due on same to January 1, 1924. All of the above items will be again referred to under "Large and Important Loans."

[fol. 225] Large and Important Loans

John H. Cooney Group:

John H. Cooney:		
As maker, single name	$600.00	
collateral	2,600.00	
		$3,200.00

As endorser, with B. H. Luttringer:		
Johnstown Prtg. & Lith. Co.	4,375.00	
Colonial Printing Co.	3,000.00	
		7,375.00
Irene E. Cooney	4,000.00	
Estate of H. B. Cooney	3,500.00	
L. J. Cooney, Agent J. T. Cooney Estate	3,000.00	
		10,500.00
		21,075.00
Collateral Loans—made payable by.		
I. G. Moyar	*3,000.00	
I. Kinter Blough	2,727.00	
J. W. Spear	*4,000.00	
Kermit Darr	*4,900.00	
O. T. Luttringer	3,737.00	
W. E. Wissinger	2,000.00	
E. S. Dent	*3,737.00	
A. B. Curry	2,000.00	
		26,101.00
		$47,176.00

Notes marked (*) are endorsed by Mr. Cooney.

[fol. 226] No Financial Statement of Mr. John H. Cooney has ever been seen by your examiner and no accurate estimate of Mr. Cooney's financial strength can be made. He is known to be a large borrower and is said to have large investments in various valuable coal properties. He is interested in the Conemaugh Coal Mining Company and other companies which are largely owned and managed by Mr. H. C. Cook. It is said that at the present time a deal is pending which provides for the sale to Mr. Cook of Mr. Cooney's holdings in the companies referred to. It is claimed that just as soon as the deal referred to is closed and payment made in accordance with the terms thereof, Mr. Cooney should be in a position to liquidate a large part, if not all, of his indebtedness to various Cambria County institutions.

The Johnstown Prtg. and Lith. Co., is a going concern, the stock in which is thought to be largely owned by Mr.

Cooney. The company owns and occupies a large and valuable business property, but is thought to also have a large total amount of indebtedness. No Financial Statement of recent date was on file for inspection. For the purpose of this report, it appears important that Mr. Cooney's contingent liability as endorser on sundry loans to the Johnstown Prtg. & Lith. Company, aggregating $4,375.00, should be considered in connection with his indebtedness to this Bank.

The Colonial Printing Company, although claimed to be incorporated, does not appear to be actively engaged in business. A note for $3,000. of which this concern is the [fol. 227] maker, is thought to represent a loan from which the Navy Smokeless Coal Company received the benefit and perhaps would be more properly classified if included in that group of loans. Bonds of the Navy Smokeless Coal Company of a par value of $3,700.00 are now held by the Bank as collateral security for said loan.

Irene E. Cooney is the wife of John H. Cooney. According to a signed statement dated July 16, 1923, Mrs. Cooney owned the following items: Real Estate, $14,300.00, Stocks, $2,000.00, and Personal Property, $7,200.00. Total $23,500.00. The same statement shows her only indebtedness to be that represented by the loan of $4,000.00 from this institution.

John H. Cooney is one of seven members of the John T. Cooney Estate. According to a statement signed by L. J. Cooney as Agent, this Estate owns Real Estate having a total assessed valuation of $34,100.00. Its indebtedness is represented as follows: Mortgage against Real Estate, $15,500.00. Loans from Banks including this institution, $12,500.00. Total $28,000.00. Based on assessed values, the Estate has a net worth of $6,100.00. The same statement shows the Real Estate owned by the John T. Cooney Estate to have an "estimated" market value of $81,000.00.

"John H. Cooney" Group.—Mr. John H. Cooney is also interested in the H. B. Cooney Estate which is a borrower from this Bank to the extent of $3,500.00. This estate is said to have assets in excess of its liabilities. No financial statement on file.

Recapitulation of Collateral held in connection with the various loans from which Mr. Cooney appears to have re- [fol. 228] ceived the benefit, all of which with one exception are carried in the names of accommodation makers.

The loans referred to represent a total amount of $28,701.00:

Items	Estimated value
$10,500 par Park Hill Coal Co., Bonds	7,875.00
9,000 " Conemaugh Coal Mining Co. Bonds	6,750.00
4,000 " Geo. Pearce & Sons, Bonds	3,000.00
100 sh Park Hill Coal Co., Stock	3,000.00
45 " Johnstown Prtg. & L. Co., Stock	2,250.00
* 500 par Park Hill Coal Co., Bonds	375.00
* 2,000 " Geo. Pearce & Sons, Bonds	1,500.00
Total	$24,750.00

No market values were obtainable for any of the above items of collateral which for the purpose of this report have been appraised as follows: Bonds, 75. Park Hill Coal Co. stock, 30: Johnstown Prtg. & Lith. Co. stock, 50.

The items marked (*) appear to have been deposited by Mr. Cooney as additional collateral to his various loans.

The "Cooney" loans as a whole are not regarded as good and desirable assets although no losses are appraised in their connection at this time. Their total amount is largely excessive for this small Bank to carry and should be substantially reduced. Pending their removal, the various collateral loans should be strengthened by additional collateral.

[fol. 229] George Kondor:

As maker:		
Single name	$275.00	
Joint, with F. H. Goebert, collateral	410.00	
$3,000. par, Geo. Pearce & Sons Bonds; 6 sh. First Nat. Bank of Conemaugh stock	3,575.00	
		$4,260.00
As endorser:		
Woodvale Drug Co.	5,100.00	
M. Marchnich	3,850.00	
John Sandor	750.00	
		9,700.00
Total		$13,960.00

Mr. Kondor is President of this Bank, and owns approximately 290 shares of its stock. A large part of Mr. Kondor's stock is thought to be pledged as collateral to loans carried in other institutions. Mr. Kondor is Treasurer of the Greek Catholic Union, a society carrying large deposit balances with this institution. He is also interested in a Hotel business located in Conemaugh.

Including his contingent liability as endorser, Mr. Kondor's line of credit is large in excess of $6,250.00, the ten per cent limit. It should be substantially reduced. While for the purpose of this report no losses are appraised in [fol. 230] connection with Mr. Kondor's loans, the same are classified as both doubtful and slow.

John H. Cooney & Geo. Kondor:

Collateral Loans—made payable by	
John Hanchak	$3,500.00
Mike J. Salem	3,500.00
August Kucharcyk	3,500.00
W. Wegrazyn	4,000.00
Total	$14,500.00

Recapitulation of Collateral Held in Connection with Above Loans

Items		Estimated value
$4,000. par,	Park Hill Coal Co. Bonds	$3,000.00
4,000. "	Geo. Pearce & Sons, Bonds	3,000.00
50. sh.	Johnstown P. & L. Co. Stock	2,250.00
50 "	Colonial Printing Co. Stock	none
Total		$8,250.00

According to a statement of assets and liabilities of John H. Cooney and George Kondor as partners, dated July 16, 1923, these parties own Real Estate having an assessed value of $26,500.00. Mortgages against these properties amounted to $15,738.00. Their other liabilities were represented by loans from various Banks amounting to $24,087.00.

The amount of $24,087.00 included the four loans above recited as well as an E. S. Dent loan for $3,737.00 which

has been previously considered in this report under the "John H. Cooney" group of loans.

[fol. 231] The statement referred to shows the Real Estate owned by Messrs. Cooney & Kondor to have an estimated market value of $55,500.00.

A mortgage for $15,000.00 is now held by this Bank as additional collateral to the Cooney-Kondor loans. This mortgage was not accompanied by proper evidence of title and priority of lien and no certificate was on file showing the value of the property covered by the mortgage. Information regarding the value of this mortgage as collateral should be furnished the Department.

In the opinion of your examiner efforts should have been made to have the various Cook-Kondor property deeded to the Bank.

In connection with the Cooney-Kondor items, it is here recommended that until such time as they are removed, all loans now carried by this Bank in the names of accommodation makers should be endorsed by the persons who received the benefit from same.

Recapitulation

John H. Cooney	$47,176.00	
George Kondor	13,960.00	
John H. Cooney & Geo. Kondor	14,500.00	
Total		$75,636.00

The above amount is in excess of the Bank's combined Capital and Surplus.

[fol. 232] Navy Smokeless Coal Company:

As maker, single name		$1,598.30
As endorser:		
Stephen A. Ward	$5,000.00	
B. F. Cooper	5,000.00	
W. H. Crum	5,000.00	
O. L. Wilson	5,000.00	
Bert Custer	5,000.00	
		25,000.00
Total		$26,598.30

The several notes aggregating $25,000.00, all of which are entered of record, represent direct obligations of the Navy Smokeless Coal Company and are so regarded by that concern. These items have been past due for about eighteen months, but show interest paid on same to July 1st, 1923.

The note for $1,598.30 appears to have been accepted from the Navy Smokeless Coal Company in payment of interest due on their various other loans. The amount of $1,598.30 was credited to Earnings during the month of June, 1923. The Bank's action in connection with this transaction, deserves criticism. Both because of the purpose for which it was taken and the unsatisfactory condition of the Navy Smokeless Coal Company's affairs, the note for $1,598.30 is not a desirable asset for this Bank to carry. While no loss is appraised in its connection at this time, it is recommended that same should be either collected or charged off.

According to appraisals which are said to have been made at various times by experts representing persons [fol. 233] interested in its purchase, the Navy Smokeless Coal Company property appears to have a value sufficiently large to permit of the payment of its entire amount of indebtedness and to return as well a large part, if not all, of their money to its stockholders, provided satisfactory arrangements can be made to sell same.

In this connection, mention is made that various offers to sell, all apparently satisfactory in respect to amount, are said to have been received and considered by the management of the Coal Company during the past two years. It is difficult to understand why no one of these propositions resulted in an "actual" sale of the property being made.

The Navy Smokeless Coal Company loans, while probably safely secured, are likely to continue to prove slow inasmuch as their liquidation appears to depend entirely upon the Company's being able to find a purchaser for the property. To accomplish this result, more strenuous efforts will be required in the future then in the past.

H. C. Cook & "Cook" Companies:

Paper:	
H. C. Cook, end. by John H. Cooney	$900.00
Conemaugh Coal Mining Co.:	
Single name	3,460.00
End. by Johnstown P. & L. Co.	150.00
End. by H. C. Cook & J. H. Cooney	3,170.00
[fol. 234] Park Hill Coal Co.:	
End. by H. C. Cook & J. H. Cooney	1,730.00
Brinker Coal Co.:	
End. by H. C. Cook	4,000.00
Collateral:	
Park Hill Coal Company	2,770.00
Jose Hetzlein	525.00
	$16,705.00

Collateral held in connection with above loans: $4,000 par value of Geo. Pearce & Sons Bonds, having an estimated value of $3,000.00.

While no losses are appraised in connection with the various items represented by the above total amount of $16,705.00, they are classified as slow.

Mr. Cook is a Coal Operator of Johnstown, Pa., whose business affairs are operated on a large scale. In addition to those concerns which are borrowers from this Bank, all of which are largely owned and actively managed by Mr. Cook, he is also interested in a number of other Coal Companies and various business enterprises. Mr. Cook is President of the First National Bank of Seward, Pa.

Financial statements on file as of date of December 31, 1922, of the Conemaugh Coal Mining Co., Park Hill Coal Company, and Geo. Pearce & Sons, show each of these concerns to have had on that date Current Liabilities which were greatly in excess of Quick Assets. The assets in each case consisted largely of Coal Lands, Buildings, and Machinery & Equipment. The statements referred to are regarded as unsatisfactory for the reason that they do not [fol. 235] show enough detailed information. In fact no statements of the above companies would be considered satisfactory by your examiner unless same had been prepared by "competent" and "outside" auditors and the values used in same were based on scientific appraisals

made of the properties. No statement of Mr. Cook's financial condition has ever been inspected by your examiner. In this connection mention is made that he enjoys the reputation of being a good "Coal" man and a money maker and his wealth has been estimated by business associates to amount to as much as $1,000,000.00.

The various "Cook" loans should be promptly reduced to a total amount coming within the ten per cent limit.

Wm. R. Fry & Edward Custer:	
Wm. R. Fry as endorser:	
Wallace Beabes	$3,300.00
R. L. Coleman	2,325.00
	$5,625.00
Wm. R. Fry & Edward Custer:	
Forwarded	$5,625.00
Edward Custer as endorser:	
W. E. Wissinger	500.00
Purity Drug Company, as maker, endorsed by:	
Wm. R. Fry & Edw. Custer	4,950.00
Total	$11,075.00

According to the best information obtainable, Mr. Fry is practically a bankrupt. Wallace Beabes and R. L. Cole- [fol. 236] man, who appear to be only "accommodation" makers of the notes endorsed by Mr. Fry, are not thought to have any financial strength.

The W. E. Wissinger note, endorsed by Mr. Custer, is not collectible from the maker with whose financial condition the Department is familiar.

No satisfactory information was obtainable regarding the strength of the Purity Drug Company, a concern owned by Messrs. Fry and Custer as partners.

Mr. Edward Custer is known to be a large borrower from various Cambria County institutions. While no definite knowledge is at the present time had of his assets, it is thought that same represent only a comparatively small percentage of the total amount of his liabilities.

In order to permit of an adjustment of his affairs, an agreement was recently entered into by Mr. Custer with certain creditors which resulted in the selection of John

H. Stephens, Esq., and Roman C. Widman, Esq., as Trustees to hold all and every asset, right and credit of the said Edward Custer, to the end that his entire estate could be used for the purpose of a pro rata liquidation of his debts among all of his creditors.

For the purpose of this report the various Fry-Custer loans listed above representing a total of $11,075.00, are appraised as losses.

[fol. 237] Eph. J. Custer (Deceased) as endorser on notes made payable by

Wm. R. Fry	$2,100.00
James R. Custer	1,900.00
Total	$4,000.00

From what appears to be reliable information, the Eph. J. Custer Estate will be able to satisfactorily take care of its obligations. Since Mr. Custer's death, the following notes which represented loans in which he was interested were removed from this Bank.

Eph. J. Custer, end. by Edward Custer	$925.00
C. D. Field—Collateral	2,975.00
W. E. Capstick—Do	2,000.00
* * * * *	
T. Stanton Davis, Collateral loan	$4,000.00
As endorser:	
Davis-Long Coal Co.	3,000.00
J. A. Boney	750.00
Total	$7,750.00

All of the above items are classified as slow. The $4,000.00 loan is probably safely secured although the collateral held in its connection is "local and unlisted" and therefore not of a desirable class. It consists of Watkins Mortgage Certificates of a par value of $4,000.00.

The safety of the Davis-Long Coal Co. and J. A. Boney [fol. 238] loans appears to depend largely, if not entirely, upon the strength of the endorsement of Mr. Davis.

No financial statement on file. While said to have valuable assets, he is also known to be a heavy borrower. This

line of credit should be substantially reduced without further delay.

John Pike as endorser:

Makers:

John Brisovac	$3,625.00
Jos. Vivoda	3,625.00
	$7,250.00

The above notes were previously referred to in this report under "Past Due Loans" and the recommendation made that this line of credit be reduced.

A. W. Kernak as endorser:

Makers:

John Sember	$3,470.00
Working Peoples M. & G. Co., Jos. Boris, and John Sember	900.00
	$4,370.00

During the past year reductions of $110.00 and $600 respectively, were made in the carrying values of the above notes. John Sember, the maker of the one note for $3,470.00, is not strong financially and this item may prove to be doubtful as well as slow. Information regarding the collectibility of this item should be furnished the Department.

John Kosty, as maker:

Endorsers:

John Sandor	$1,000.00
M. Makuchan	2,500.00
	$3,500.00

[fol. 239] The carrying values of the above items were respectively reduced $500.00 and $800.00 during the past year.

C. F. Wilson, as maker	$1,000.00
do.	2,400.00
	$4,150.00

Both of the above loans are represented by Mr. Wilson's single name notes. The note for $2,400.00 was taken to replace one for the same amount which was made payable by Samuel R. Bell and endorsed by Mr. Wilson. These loans are not at present collectible from the maker who recently met with financial troubles. As security for same, the Bank holds a mortgage for $4,100.00 made payable by Mr. Wilson. This mortgage represents a second lien on property said to be worth about $12,000.00 and against which there is a first mortgage of $4,000.00

Jos Seman, as maker, single name $3,680.00

These items were previously referred to in this report and appraised as losses.

Jos. Woykoczky & Emma Woykoczky $2,015.00

The above loan was also previously referred to in this report and appraised as a loss.

Jos. J. Kamara, single name $1,000.00

Mr. Kamara is a brother-in-law of Geo. Kondor. No financial statement on file for inspection. Regarded as slow and doubtful.

Other Large Lines of Credit:

Sterling Commercial Company:		
As maker, single name	$1,700.00	
As endorser	.....	
[fol. 240] Makers:		
Calvin C. Rush	2,100.00	
R. M. Shuster	3,000.00	
		$6,800.00
A. G. Mayer, Jr., as endorser:		
Makers:		
Regina Mayer	700.00	
L. A. Sible	3,000.00	
		3,700.00
G. H. McNullen, as maker, single name	1,500.00	
End. by B. H. Luttringer	300.00	
Mine Lumber Company	1,500.00	
		3,300.00
John Sukenik, endorsed by John Miske & A. Molchany		3,000.00

Harry M. Storey, Jr., endorsed by Alvin Sherbine	2,400.00
Alex Cover	1,900.00
Cambria Car & Fdry. Co., end. H. J. Widman	1,700.00
Margaret Kelly	1,600.00
Sam Blagovich, end. by M. N. Gluminich & Sam Kooser	1,400.00
M. J. Solony	1,300.00
Windber Clay Mining Co., end. by Wm. H. Sunshine	1,000.00
John Vladic	1,000.00
David Wilson, end. by D. Rothstein	1,000.00
W. M. Reffner	900.00
Rowena Coal Company (six endorsers)	900.00
Trustees of the Russian G. C. Church	700.00
[fol. 241] Johnstown Soil Food Company, endorsed by A. G. Mayer, Jr., & W. J. Kesslak	700.00
R. M. Good, end. by Daniel Good	925.00
S. Holzman	900.00
Geo. D. Gartland	945.00
Fred G. Beiter, end. by Jos. Beiter	700.00
Jos. Bendik	525.00
Harry V. Kuntz, end. by D. Rothstein	500.00
H. F. Confer	800.00
Borough of Franklin (3 loans)	47,800.00

The above loans were accompanied by resolutions and a certificate was held by the Bank stating that same were within the legal borrowing limit of the Borough. Two of these notes, aggregating $32,800.00 were re-discounted at the Colonial Trust Company, Pittsburgh, Pa., during examination. The two loans referred to appear to have been made by the Borough for the purpose of establishing a Sinking Fund. The amount of $32,800.00 is carried as a Savings Deposit in this institution. While the Borough of Franklin loans are probably safe enough, their total amount is largely excessive for this Bank to carry.

Collateral Loans.—In addition to various loans, aggregating $54,071.00, which have been previously referred to in this report in connection with a discussion of the lines of credit extended to John H. Cooney, George Kondor, John H. Cooney and George Kondor, H. C. Cook Coal Com-

panies, and T. Stanton Davis, the following Collateral Loans were also carried on date of examination.

[fol. 242] Makers	Amount
Harry Davis	$1,900.00
Alvin Sherbine	550.00
D. R. Schnabel	900.00
B. H. Luttringer (2)	465.00
H. J. Widman	450.00
J. A. Fry	750.00
F. B. Custer	3,350.00
M. B. Nairn	1,550.00
A. E. Cassler	1,200.00
Geo. D. Gartland	2,500.00
Walter Jones	850.00
D. R. Schnabel	2,790.00
E. J. Hessler	150.00
S. C. Davis	4,740.00
Wm. H. Smith	4,760.00
A. L. Adams	215.00
M. Kesslak	3,400.00
H. M. Horn	2,000.00
Geo. Gregory	40.00
D. Rothstein	1,450.00
John Matta	2,000.00
Total	$36,010.00

Special attention is here called to the following loans which are included in the above list.

John Matta, $2,000.00.—This loan is not collectible from its maker and the collateral held in its connection is regarded as having no value. It is appraised as a loss.

J. A. Fry, $750.00.—This loan appears to represent a substitution for one previously carried in the name of E. R. Cherry. The maker is a brother of Wm. R. Fry. The [fol. 243] collateral consists of $1,000.00 par value of Cambria Car and Fdry. Co. bonds.

D. R. Schnabel, $900.00.—This loan appears to have been taken to replace a loan made payable by P. N. Spiers and endorsed by Edward Custer and D. R. Schnabel. Collateral,—$1,000. George Pearce & Sons bond.

While no losses are appraised in connection with any of the above listed loans except that of John Matta, mention is made that the collateral as a whole consists almost entirely of "local and unlisted" securities for which no market values are obtainable. Unless reduced by payments, practically all of the above loans should be strengthened by additional desirable collateral.

Recapitulation of Loans

John H. Cooney	$47,176.00
Geo. Kondor	13,960.00
John H. Cooney & Geo. Kondor	14.500.00
Navy Smokeless Coal Company	26,598.30
H. C. Cook & "Cook" Companies	16,705.00
Wm. R. Fry & Edward Custer	11,075.00
Eph. J. Custer	4,000.00
T. Stanton Davis	7,750.00
John Pike	7,250.00
A. W. Kernak	4,370.00
John Kosty	3,500.00
C. F. Wilson	4,150.00
Jos. Seman	3,680.00
[fol. 244] Jos. Woykoczky	2,015.00
Jos. J. Kamara	1,000.00
Various makers, as per items listed on sheet 11, 24 groups	38,595.00
Various collateral loans, Items listed on sheet 12	36,010.00
Borough of Franklin	47,800.00
All other items, not included in either of the above groups or lists	19,637.30
Total	$309,771.60

Losses amounting to $18,770.00 have been appraised in connection with this Bank's loans. $170,000.00 is estimated as the amount of loans which represent slow assets. 15% of that amount, or approximately $25,000.00 of the slow loans are classified as doubtful.

In view of the present condition of this institution, it is recommended that proper efforts be made to have all loans liquidated as rapidly as possible, and that special attention be given to the several dangerously excessive lines of credit which are now carried.

[fol. 245] Investment Securities

	Carrying value
*$3,000 par Conemaugh Coal M. Co. Bonds	$3,000.00
*5,000 Cambria Car and Fdry. Co. Bonds	5,000.00
*2,500 par Park Hill Coal Co., Bonds	2,500.00
*14,000 par Geo. Pearce & Sons, Bonds	14,000.00
20,000 par Penn Valley Coal Co. First Mtge. Part. Certificates	20,205.00
5,000 part Warner Sugar Co. 7% Bonds	4,812.50
Total	$49,517.50

The items marked (*) have been carried as assets by this Bank for at least several years. All other items included in the above list were acquired by this Bank since December 1, 1923.

The Warner Sugar Co. bonds were regularly purchased through a Broker and paid for on January 2, 1924.

The various other items, representing a total carrying value of $36,705.00, were accepted by the Bank in substitution for sundry items of indebtedness of John H. Cooney and H. C. Cook which were at the time carried.

The Penn Valley Coal Company certificates are issued against a mortgage for $177,000.00 on property claimed to have been appraised by reliable and competent authorities [fol. 246] as worth an amount in excess of $500,000.00. For the purpose of this report they are appraised at par, the item showing a depreciation of $205.00.

The Warner Sugar bonds are regarded as worth the amount paid for same at which they are carried.

Based on an estimated value of 75, the bonds of the Cambria Car & Fdry. Co., Conemaugh Coal Mining Co., Park Hill Coal Co., and Geo. Pearce & Sons, representing a total par value of $24,500.00, show a depreciation or loss of $6,125.00.

Total Depreciation, $6,330.00.—In this connection mention is made that the total amount of depreciation in Investment Securities was incorrectly stated in the "preliminary" report of this examination as being $6,455.00. In order to not change the amount of impairment, the estimated amount of interest accrued on Savings accounts will be increased to $1,925.00.

Inasmuch as a large part of the total amount of depreciation above shown is represented by those securities taken over in payment of various Cooney & Cook obligations and because of the fact that said securities are neither "liquid" or "desirable" assets for this Bank to carry, it is recommended that same be promptly removed by the parties referred to.

As of date of July 5, 1923, this Bank's Investment Securities included Liberty Loan Bonds of a par value of $20,550.00 and various Equipment Trust Bonds of a total par value of $32,000.00. On July 31, 1923, the items referred to were pledged as collateral to a loan from the Colonial [fol. 247] Trust Company of Pittsburgh for $40,000.00. To permit of the payment of said loan on October 23d, the bonds were sold.

Real Estate.—Office Buildings and Lot and Furniture & Fixtures are carried in one general ledger account, the total amount being distributed ledger account, the total amount being distributed as follows:—Office Building, $20,000.00. Furniture & Fixtures, $5,159.46. The carrying value of the latter account was increased $9.90 since January 11, 1923.

For the purpose of this report Furniture & Fixtures are not regarded as having a "liquid" value in excess of $3,500.00 and a loss of $1,659.46 is therefore appraised in con-ection with this item.

Other Real Estate.—

A three story brick building adjoining, and two frame dwellings & shop in rear of Office Building	$22,500.00
Whitney-Darr property located in Viewmont, a suburb of Johnstown, Pa.	7,286.00
Total	$29,786.00

The Office Building & Lot and property located next door and in the rear of same, carried at a total amount of $42,500.00, has an assessed valuation of $35,000.00. Against same there is an indebtedness of $10,000.00 represented by a mortgage which has been carried since the property was purchased. Taxes and Insurance amount to approximately $1,400.00 per year. Interest paid on mortgage $540.00

[fol. 248] yearly. Based on present rentals, a total income of $3,696.00 per year is received from the property.

It is thought that the above items of Real Estate are probably worth the amount at which carried.

Whitney-Darr Property.—Title to this property was taken by the Bank during the month of October, 1923. Its present carrying value is represented by the following items charged against this account.

Whitney-Darr Judgment Note	$5,150.00
Amount owned on property	900.00
Cost of Improvements	1,236.00
Total	$7,286.00

A Mechanic's Lien against this property, amounting to approximately $1,000.00, is said to be unpaid. In view of this condition and the fact that other expenses are likely to be incurred in its connection before same can be sold, a loss of $1,500.00 is appraised in connection with this item of Real Estate.

Miscellaneous Assets (Represented by General Ledger Accounts)

*Over & Short account	$2.54
*Amount cabled to Europe in connection with Foreign Department business	254.38
[fol. 249] Amount of change carried in Foreign Department	100.00
*Deficit in Earnings	3,846.59
	$4,203.51

The items marked (*) represent losses and will be so regarded in appraising this Bank's assets.

Capital, $50,000.00. Surplus, $12,500.00

Distribution of Demand Deposits

	Int. paid		Amount
Greek Catholic Union, (5 accts.)	2%		$126,068.11
Franklin Borough School District		$31,178.18	
Commonwealth of Penna.	3%	10,000.00	
L. Larimer, County Treas.		5,000.00	
Johnstown School District	2%	4,804.44	
W. E. Smith, Treas. Franklin Boro.		3,000.00	
			53,982.62
Various other deposit accounts			30,607.62
Total			$210,658.35

Distribution of Savings Deposits

Greek Catholic Union	4.0%	$52,976.79	
Borough of Franklin	3.5%	32,800.00	
[fol. 250] Sundry accounts, (3)	3.5%	13,119.64	
Various other deposit accounts	3.5%	69,074.68	
Total			$167,971.11

It is estimated that on date of examination this Bank's liability for interest due on Savings Deposits amounted to $1,925.00. This amount will be considered in the appraisement.

As shown by the above recapitulations, the total amount of deposits carried with this Bank is unsafely distributed.

Withdrawals of Deposits.—The dangerous condition in which this Bank appears to be now placed as the result of large withdrawals of deposits from the Greek Catholic Union accounts which have been for some weeks and are still being made, as well as the probability that the total amount of said accounts will be withdrawn in the near future, were both fully explained in the "preliminary" report of this examination.

Statement of Income Received

	From Jan. 1, 1923, to June 30, 1923	From July 1/23 to Dec. 31/23
Foreign Department	$1,635.83	$320.24
Interest on Loans	7,549.90	6,999.77
Interest on Bonds	683.02	1,288.05
Interest on Bank Balances	936.54	699.17
Rent	1,624.20	1,439.00
Miscellaneous	44.40	.....
Totals	$12,473.89	$10,746.23
[fol. 251] Total Income received during the year of 1923		$23,220.12

Statement of Expenses

	From Jan. 1, 1923, to June 30, 1923	From July 1/23 to Dec. 31/23
Salaries	$3,875.50	$2,392.50
Taxes	4.05	1,748.41
Postage	145.24	428.00
Insurance & Bonds	560.33	615.69
Stationery & Printing	107.94	485.07
Freight & Express	3.61	6.33
Water & Light	227.36	200.07
Telephone & Telegraph	150.83	166.63
Advertising	441.66	690.66
Fuel	61.50	78.75
Donations	49.00	
Miscellaneous:		
Janitor	128.65	60.00
Carpenter	54.50	261.34
Bank Examination	140.37	
Harrisburg trip	100.00	
Attorney	371.34	
Pool Room (cost)	350.00	
Plumbing	.....	149.12
Storage (automobile)	.....	89.65
Pool Room Rent	.....	805.00
Auditing Foreign Dept.	.....	649.72
Legal Expense	.....	22.36
Sundry Items	96.60	180.19
Totals	$6,868.48	$9,029.49

[fol. 252] Total Expenses paid during the year of 1923 ..... $15,897.97

Statement of Losses Charged Against Expense Account (During the Year 1923)

Foreign Department loss	$1,492.50
Kronen	2.30
M. Lesson note	150.00
Loss on bonds sold	180.35
Cash short discrepancies	418.40
Ledger discrepancies	64.05
Total	$2,307.60

Statement of Earnings (for Year Ending December 31, 1923)

Expenses paid	$15,897.97
Interest paid	9,970.11
	$25,868.08
Less Income received	23,220.12
	$2,647.96

Deficit in Earnings

Statement of Undivided Profits:

Balance, January 1, 1923	$483.58	
Items credited:		
Liberty Bond Payments	$131.00	
Reserve for Depreciation	420.00	
Cash long discrepancies	71.85	
Ledger discrepancies	22.00	
Sundry refunds	152.92	
		$1,281.35
[fol. 253] Less:		
Deficit in Earnings	$2,647.96	
Losses charged off	2,307.60	
		4,955.56
Undivided Profits Deficit, December 31, 1923		$3,674.56

Earnings.—Because of the small amount of deposits carried by this Bank and due to the fact that interest is paid on a large percentage of said deposits, the Commercial Department of this institution was a money maker. In former years the profit derived from the Foreign Department was sufficiently large to take care of all operating expenses. During the past year only a small volume of business was handled through the Foreign Department, which resulted in reduced earnings. An inspection of the Statement of Expenses listed on sheets 17 shows various large amounts to have been expended which might have been saved had this Bank's affairs received proper attention from those in charge of its management.

A loss of $1,492.50 charged to Expense account is thought to have occurred as the result of speculation in the Foreign Money market.

Appraisement

Surplus		$12,500.00
Less items appraised as Losses:		
Deficit in Earnings, as per General Ledger accounts	$3,846.59	
Over & Short account	2.54	
C. F. Wilson cash item	100.00	
Foreign Department item	254.38	
[fol. 254] Pool Room Overdraft	326.85	
Various loans (per list—sheet 18)	18,770.00	
Furniture & Fixtures	1,659.46	
Whitney-Darr property	1,500.00	
Depreciation—Investment Securities	6,330.00	
Estimated amount of interest due on Savings accounts	1,925.00	
		$34,714.82
Impairment of Capital		$22,214.82

Loans Appraised as Losses (See Appraisement)

W. Beabes, end. by Wm. R. Fry	$3,300.00
R. L. Coleman, end. by Wm. R. Fry	2,325.00
W. E. Wissinger, end. by Edward Custer	500.00
Purity Drug Co., endorsed by Wm. R. Fry & Edward Custer	4,950.00
Jos. Seman	3,680.00
Jos. Woykoczky	2,015.00
John Matta	2,000.00
Total	$18,770.00

Directors.—George Kondor, John H. Cooney, I. M. Chaplin, John H. Stephens, Michael Kesslak, B. H. Luttringer, Robert Denny, and Michael Mulvehill.

Messrs. Denny and Mulvehill are new members of the Board, having been elected directors on November 27, 1923. There is at present a vacancy on the Board due to the recent death of Hon. M. B. Stephens.

[fol. 255] George Kondor is President of the Bank and E. R. Cherry, Cashier.

A letter from George Kondor informing the directors of his resignation as a Director and as President of the Bank was on file. No action appears to have been taken on same.

Minutes.—During the first seven months of the year 1923, meetings of the Board of Directors were regularly held. Average attendance, 4.

No meetings held during the months of August, September, October and November. This condition deserves criticism.

The business of this Bank has not received proper attention from its directors.

Bonds of Employees.—E. R. Cherry, Cashier, and Mary F. Sember, a clerk, are each bonded for $25,000.00. Both bonds run to the Commonwealth but that of the Cashier has neither been approved by the Court nor recorded. Mr. Cherry has not entered into Articles of Agreement, as required by the Act.

Because of the many matters of importance referred to herein, attention is called to the entire report.

In conclusion would state that this Bank is in an unsafe and unsound condition.

Respectfully submitted.

(Signed) H. J. Phillips, Examiner.

[fol. 256]

Examination, January 15, 1923

Loans to Officers and Directors and to Houses or Firms with Which They are Connected

Names	Paper	Collateral	Total	Endorsement
John H. Cooney				
As maker	.....	.....	.....	5,800.00
As endorser	600.00	2,600.00	.....	.....
Wife & estates	7,375.00	.....	.....	.....
Various makers	10,500.00	.....	.....	.....
Geo. Kondor:	.....	26,101.00	47,176.00	.....
As maker				
As endorser	685.00	3,575.00	.....	.....
John H. Cooney and Geo. Kondor:	9,700.00	.....	13,960.00	.....
Various makers				
I. M. Chaplin	.....	14,500.00	14,500.00	.....
M. Kosslak	600.00	.....	600.00	1,450.00
Item	.....	3,400.00	3,400.00	.....
B. H. Luttringer	802.30	.....	.....	7,375.00*
Mines Lumber Co. ...	215.00	465.00	.....	1,580.00
[fol. 257] John H. Stephens	1,500.00	.....	2,982.30	.....
Robert Denny	3,000.00	.....	3,000.00	.....
Items.	.....	.....	.....	200.00
E. R. Cherry, Cashier	23.95	.....	23.95	.....
Totals	35,001.25	50,641.00	85,642.25	16,405.00
Less Duplication				7,375.00
Total amount loaned				9,030.00
25% of Capital & Surplus		85,642.25		
		15,625.00		
Amount in excess		70,017.25		

Loans to John H. Cooney and Geo. Kondor were largely in excess of ten per cent of the Bank's combined Capital and Surplus. See written report.

[fol. 258] PLAINTIFF'S EXHIBIT "C"

Agreement of Counsel as to Admission in Evidence

Counsel for the Plaintiff, and for American Surety Company, defendant, do hereby agree, that in addition to such admissions of facts as appear in the pleadings in this case, the following stated facts may be considered as admitted, so far as they are pertinent to the issues involved in this case.

First. George Kondor was suspended from the office of Supreme Treasurer of the Greek Catholic Union, by action of the Supreme Assembly of said Union on April 7th, 1924.

Second. The authorized capital stock of the Peoples State Bank of Johnstown, Pa., was Fifty Thousand ($50,000.00); and George Kondor was President of said Bank in the months of January, February and March 1924, and had held that office for some time previous to said dates.

Third. In the year 1924, the dates March 29th and April 5th respectively, fell on Saturday.

Fourth. It is further agreed that with respect to the financial condition of said Peoples State Bank of Johnstown, Pa., at the end of the month of March 1924, the Statements, Schedules of assets and Liabilities and balance sheets prepared for the State Bank Examiner upon the examination of said bank at that time, or duly authenticated copies thereof may be admitted in evidence, without the produc-
[fol. 259] tion of the original books, documents, papers and memoranda from which the same were prepared.

Ralph C. Davis, Attorney for Plaintiff. James M. Magee, Attorney for Defendant.

PLAINTIFF'S EXHIBIT "D"

Peoples State Bank of Johnstown, Pa.

Daily Statement for March 31, 1924

Resources

Accounts	Detail	Total
Loans and Discounts		$298,200.55
Stocks		
Overdrafts		326.85
Other Real Estate Owned		29,786.00

Accounts	Detail	Total
Banking House, Fur. & Fixtures		25,159.46
Current Expenses		6,444.60
O. & S.		13.65
O. R.		354.38
Due from Other Banks		
First National, Johnstown, Pa.		3,456.17
First National, Conemaugh, Pa.		
Pa. Trust Co., Johnstown, Pa.		9,330.35
U. S. Liberty Bonds 1 Loan		
U. S. Liberty Bonds 2 Loan		
U. S. Liberty Bonds 3 Loan		
U. S. Liberty Bonds 4 Loan		1,000.00
U. S. Liberty Bonds 5 Loan		
Bonds Equipment		
Public Service Corp. Bonds		44,705.00
[fol. 260]		
Due from Reserve Agents		
Irving Nat. Bank N. Y.	$1,552.23	
Corn Exchange Nat'l Bank Phila.	24,394.09	
Commonwealth Trust Co. Pgh.		
Guaranty Trust Co. N. Y.		
American Exch. Nat'l Bk. N. Y.	7,817.46	
Colonial Trust Co. Pgh.	54,940.61	
		88,704.39
War Savings Stamps		
Documentary War Stamps		
Cash Items		
Nickels, Etc.		
Cash		20,971.62
Silver Coin (Dollars $—)		
Gold Coin		
Legal Tender Notes		
Taxes Pd. Acct.		138.60
Ins. Pd. Acct.		1,167.75
Int. Pd. Acct.		4,004.32
Total		$533,763.69

Liabilities

Capital Stock Paid In	$50,000.00
Surplus Fund	12,500.00

Accounts	Detail	Total
Foreign Exchange		43.27
Rent		3,773.95
Undivided Earnings		
Exchange		
Payments on L. L. Bonds		
U. S. Liberty Bonds 3 Loan		
U. S. Liberty Bonds 4 Loan		
[fol. 261]		
U. S. Liberty Bonds 5 Loan		
Reserve for Interest		
Due to Other Banks		
Special Reserve		20,717.24
Dividends Unpaid		
Individual Deposits Led. No. 1	272,064.05	
Individual Deposits Led. No. 2		
Savings Deposits Led. No. 1	161,520.70	
		433,584.75
Savings Deposits Led. No. 2		
Demand Certificates of Deposits		2,243.48
Certified Checks		
Other Liabilities		10,000.00
Reserve—Per cent		
Total		$533,263.69

PLAINTIFF'S EXHIBIT "E"

Peoples State Bank, Johnstown, Pa.

Daily Statement for April 5th, 1924

Resources

Accounts	Detail	Total
Loans and Discounts		$292,126.05
Stocks		
Overdrafts		326.85
Other Real Estate Owned		29,824.00
Banking House, Fur. & Fixtures		25,159.46

Accounts	Detail	Total
Current Expenses		
Due from Other Banks		
First National, Johnstown, Pa.		3,456.17
First National, Conemaugh, Pa.		
[fol. 262]		
Pa. Trust Co., Johnstown, Pa.		2,536.69
U. S. Liberty Bonds 1 Loan		
U. S. Liberty Bonds 2 Loan		
U. S. Liberty Bonds 3 Loan		
U. S. Liberty Bonds 4 Loan		1,000.00
U. S. Liberty Bonds 5 Loan		
Bonds Equipment		
Bonds		44,500.00
Other Resources		254.38
Due from Reserve Agents		
Irving Nat. Bank N. Y.	$1,554.89	
Corn Exchange Nat'l Bank Phila.	22,667.46	
Commonwealth Trust Co. Pgh.		
Guaranty Trust Co. N. Y.		
American Exch. Nat'l Bk. N. Y.	8,650.13	
Colonial Trust Co. Pgh.	47,966.65	
		80,839.13
War Saving Stamps		
Documentary War Stamps		
Cash Items		
Nickels, Etc.		
Cash		10,330.35
Silver Coin (Dollars $—)		
Gold Coin		
Legal Tender Notes		
Deficit in Earnings		6,751.22
Total		$497,104.30
[fol. 263]		
Capital Stock Paid in		$50,000.00
Surplus Fund		12,500.00
Undivided Earnings		
Exchange		
Payments on L. L. Bonds		

Accounts	Detail	Total
U. S. Liberty Bonds 3 Loan		
U. S. Liberty Bonds 4 Loan		
U. S. Liberty Bonds 5 Loan		
Reserve for Interest		
Due to Other Banks		
Special Reserve		
Dividends Unpaid		20,717.24
Individual Deposits Led. No. 1	$239,406.19	
Individual Deposits Led. No. 2		
Savings Deposits Led. No. 1	162,189.84	
		401,596.03
Savings Deposits Led. No. 2		
Demand Certificates of Deposits		2,291.03
Certified Checks		
Other Liabilities Mtg.		10,000.00
Reserve—4 Per cent		
Total		$497,104.30

[fol. 264] PLAINTIFF'S EXHIBIT "F"

This agreement made and entered into this seventh day of April, 1924, by and between the United States Trust Company of Johnstown, Pennsylvania, a corporation duly created and existing under the laws of the commonwealth of Pennsylvania, having its domicile in the city of Johnstown, party of the first part, and the Greek Catholic Union of the U. S. A., a corporation likewise created and existing under the laws of the commonwealth of Pennsylvania, having its domicile in the borough of Munhall, party of the second part.

Whereas, the Greek Catholic Union has passed the following resolution:

Whereas the Peoples State Bank of Johnstown has on deposit upwards of $200,000 of the money of the Greek Catholic Union, deposited therein by George Kondor, Supreme Treasurer; and

Whereas the said George Kondor, Supreme Treasurer, has notified the Supreme Officers of the Greek Catholic Union that he has failed to keep intact and absolutely ac-

count for all funds of the Order in accordance with the Constitution and By-laws of the Greek Catholic Union, in [fol. 265] that the Peoples State Bank of Johnstown will not pay certain cheques which have been drawn; and

Whereas the Supreme Officers have been notified and informed by the State Banking Department of Pennsylvania that it will close the said Bank on Monday, April 7, 1924, and compel the liquidation of said bank; and

Whereas such action would cause great loss to the Greek Catholic Union; and

Whereas The United States Trust Company of Johnstown, in order to prevent such a situation and loss, has offered to assume inter alia, the despositary liability of the said Peoples State Bank as shown by the books of said Peoples State Bank at the close of business on April 5, 1924, by issuing to the Greek Catholic Union its certificate or certificates of deposit in the total sum of $200,000 payable four (4) years from date, without interest, and to pay the balance due in cash; and

Whereas it is the opinion of the Supreme Officers and likewise of the State Banking Department that the acceptance of such offer of The United States Trust Company of Johnstown would save the Greek Catholic Union from great loss:

Therefore, be it resolved and it is hereby resolved by the Supreme Assembly that the deposit of the Greek [fol. 266] Catholic Union now in the Peoples State Bank of Johnstown which is to be taken over by The United States Trust Company of Johnstown shall be assumed and paid by The United States Trust Company of Johnstown as follows: $200,000 at the expiration of four (4) years from date, to be evidenced by a certificate or certificates of deposit without interest, and the balance of such deposit to be paid in cash.

Now, this agreement witnesseth that, for and in consideration of the mutual covenants herein, The United States Trust Company of Johnstown hereby agree to issue its certificate or certificates of deposit in the said sum of $200,000 payable in four (4) years from date without interest, and to pay such balance as the books may show in cash, according to above resolution:

And it is further agreed that if The United States Trust Company of Johnstown shall realize from the assets of

the Peoples State Bank a sum sufficient to pay all depositary liability of the said Peoples State Bank within four (4) years from date, then it, the said The United States Trust Company of Johnstown, shall notify the said Greek Catholic Union that it pay present for payment and it, the said The United States Trust Company of Johnstown, will thereupon pay said certificate or certificates of deposit.

In witness whereof the parties hereto have caused their [fol. 267] common and corporate seals to be hereto affixed by the hands of their presidents, duly attested by their secre-aries, the day and year first above written.

The United States Trust Company of Johnstown, by John H. Waters, President. Attest: I. E. Jendricks, Secretary. (Seal.) Greek Catholic Union of the U. S. A., by Michael Yuhasz, Sr., President. Attest: Geo. H. Kolmos, Secretary. (Seal.)

PLAINTIFF'S EXHIBIT "G"

Plaintiff's Exhibit "G" consists of eleven (11) checks dated March 29th, 1924, signed by George Komlas as Treasurer and signed and countersigned in due form by other authorized officers of Greek Catholic Union amounting to the sum of $89,538.50.

[fol. 268] PLAINTIFF'S EXHIBIT "H"

Plaintiff's Exhibit "H" consists of sixteen (16) checks dated from February 27th, 1924 to March 21st, 1924, signed by various officers of Greek Catholic Union amounting to the sum of $4,341.26.

DEFENDANT'S EXHIBIT No. 2

This indenture, made the seventh day of April, 1924, by and between Peoples State Bank, a corporation organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, party of the first part, here-

inafter referred to as grantor, and The United States Trust Company of Johnstown, a like corporation, party of the second part, hereinafter referred to as grantee,

Witnesseth that the grantor has and in consideration of the sum of one dollar to the grantor in hand paid by the grantee at and before the ensealing and delivery hereof, the receipt whereof is hereby acknowledged, as well as other good and sufficient considerations to the said grantor moving, the grantor does by these presents grant, bargain, sell, assign, transfer, convey and deliver to the said grantee, its successors and assigns, all the property mentioned and described as follows, to wit:

(a) All real estate and lands and all right, title and interest therein which the grantor owns or possesses or is [fol. 269] entitled to, and wheresoever situated;

(b) All mortgages and judgments, whether entered of record in the proper offices for the recording of such instruments or not, of, in or to which grantor may have any right, title or interest;

(c) All personal property of every name, nature and description owned by the grantor and located in its building at No. 120 Broad Street, Johnstown, Pennsylvania, or elsewhere, and whether in the hands of said grantor or any of its agents or employees or in the hands of others;

(d) All moneys of grantor, whether in its building at No. 120 Broad Street, aforementioned, or deposited for its account in any other trust company or bank or other place, and whether distributed on its books to the account of surplus funds or undivided profits or reserves or otherwise, as well as all moneys in its custody or due it through the natural operation of its business;

(e) All bills, notes, negotiable and non-negotiable instruments and securities and any and all other evidence of indebtedness for money, including the collateral security attaching thereto, of every nature and description owned by the grantor or in which the grantor has any right or interest, and whether in its possession or in the possession of others;

[fol. 270] (f) All stocks, bonds and securities, bills and accounts receivable of grantor, from whomsoever due and wheresoever evidence thereof, if any, may be held;

(g) All interests, rents, dividends and other profits, earned and accrued to the grantor, or in which it has any right or interest;

(h) All contracts, contract rights, rights and choses of action of whatever nature or description of the grantor, pertaining to its said business or property or growing out of the same;

(i) All mixed property of every nature and description owned by the grantor or in which the grantor has any right or interest, wheresoever situated;

(j) All the rights, franchises and good will of the grantor;

And the grantor does hereby give to the grantee, its successors and assigns, the full power and authority for its or their own use and benefit but at its or their own cost, to take all legal measures which may be proper or necessary for the complete recovery of any or all of the business, property, rights, privileges and franchises herein mentioned and included or intended so to be, and in grantee's name or otherwise to prosecute or withdraw any suits or proceedings at law or in equity therefor:

It being the intention of the grantor hereby to convey, transfer, assign and set over to the grantee, its successors and assigns, all of its franchises and rights and all of its business and property of whatever nature and kind and [fol. 271] wheresoever situated, whether specifically mentioned herein or not, to the end that the said grantor may be dissolved;

To have and to hold the said business, property, rights, privileges and franchises and all and singular the said premises and every part thereof, with the appurtenances unto the said grantee and its successors and assigns forever:

In consideration whereof, and of the said premises, The Grantee Agrees to and does hereby become liable for and assumes all leases, contracts, engagements, liabilities, trusts, obligations and duties of the grantor or devolving upon it, and hereby covenants and agrees to perform, carry out and discharge the same and each and every one of them: excepting, however, capital stock liability.

Peoples State Bank does hereby constitute and appoint E. R. Cherry to be its attorney for it, and in its name and as and for its corporate act and deed to acknowledge this Indenture before any person having authority by the laws of the Commonwealth of Pennsylvania to take such acknowledgment to the end that the same may be duly recorded.

The United States Trust Company of Johnstown does hereby constitute and appoint I. E. Jendricks to be its attorney for it, and in its name and as for its corporate act and deed to acknowledge this Indenture before any person [fol. 272] having authority by the laws of the Commonwealth of Pennsylvania to take such acknowledgment to the end that the same may be fully recorded.

In witness whereof the parties hereto have caused this Indenture to be signed in their respective corporate names by their respective presidents, or one of their respective vice presidents, and their respective corporate seals to be hereunto affixed and to be attested by their respective secretaries or one of their respective assistant secretaries the day and year first above written.

Peoples' State Bank, (Signed) by George Kondor, President. Atttest: (Signed) E. R. Cherry, Secretary. (Peoples State Bank, Johnstown, Pennsylvania. Incorporated 1917.) The United States Trust Company of Johnstown, (Signed) by Jno. H. Waters, President. Attest: (Signed) I. E. Jendricks, Secretary. (The United States Trust Company, Johnstown, Pennsylvania. Incorporated —).

[fol. 273] STATE OF PENNSYLVANIA,
County of Cambria, ss:

I hereby certify that on this seventh day of April, 1924, before me, the subscriber, a notary public in and for said County and State, personally appeared E. R. Cherry, the attorney named by Peoples' State Bank in the foregoing Indenture, and, by virtue and in pursuance of the authority therein conferred upon him, acknowledged the said Indenture to be the act of the said Peoples' State Bank, to the end that the same might be duly recorded as such.

Witness my hand and notarial seal the day and year aforesaid.

(Signed) Elizabeth R. Taney, Notary Public. My commission expires March 7, 1925. (Seal.)

STATE OF PENNSYLVANIA,
County of Cambria, ss:

I hereby certify that on this seventh day of April, 1924, before me, the subscriber, a notary public in and for said county and state, personally appeared I. E. Jendricks, the attorney named by the United States Trust Company of Johnstown in the foregoing Indenture, and, by virtue and in pursuance of the authority therein conferred upon him, acknowledged the said Indenture to be the act of the said [fol. 274] the United States Trust Company of Johnstown, to the end that the same might be duly recorded as such.

Witness my hand and notarial seal the day and year aforesaid.

Harry V. Kruntz, Notary Public. My commission expires Jan. 15, 1927. (Seal.)

Copy of Indenture (Concluded).

I hereby Certify that the precise office and place of business of the within named the United States Trust Company of Johnstown is No. 206 Franklin Street in the City of Johnstown, Cambria County, Pennsylvania.

(Signed) J. C. Davies, Attorney for the United States Trust Company of Johnstown.

April 7, 1924.

COMMONWEALTH OF PENNSYLVANIA,
County of Cambria, ss:

Recorded on this 8" day of April A. D. 1924 in the Recorder's Office of said County in Deed Book Vol. 380 page 196. Given under my hand and seal of the said office the day and year aforesaid.

(Signed) Ross Danner, Recorder. L. E. (Recorder's Seal.)

[fol. 275] ORAL CHARGE OF THE COURT

GENTLEMEN OF THE JURY: You have been sworn to try the issues of fact in an action brought by the Greek Catholic Union, the plaintiff, against the American Surety Company of New York and George Kondor, jointly. That is, the action is a joint action against the defendants.

Before discussing the issues of the case, let me say to you that the burden of proof is upon the plaintiff, and before you are entitled to find a verdict in behalf of the plaintiff it must satisfy you by the fair weight of the evidence of all the essential facts necessary to sustain such a verdict.

The action in the present case is based upon a contract of insurance which has been offered in evidence before you. George Kondor, one of the defendants, was treasurer of the Greek Catholic Union and, as such, was required to furnish surety bond in the sum of $100,000 for the faithful discharge of his duties, in accordance with the by-laws of the Union. The other defendant, the American Surety Company of New York, in consideration of a cash premium of $500 from the plaintiff, entered into such a surety bond—the surety bond in suit—whereby it insured to the plaintiff the fidelity of George Kondor as treasurer of the plaintiff in the performance of his duty.

The bond was first given in 1920 and was renewed from year to year, and it is admitted it was in force in April, 1924. By this bond the Surety Company was bound to reimburse the plaintiff for any pecuniary loss which the Greek Catholic Union might sustain by reason of any de- [fol. 276] fault or failure of George Kondor in the discharge of his duties as treasurer, as set forth by the By-Laws of the plaintiff Union, or through his failure to keep intact and account for all funds of the plaintiff as prescribed by the By-Laws of the Union, or through the failure of any bank in which he deposited the plaintiff's funds.

The defendant Surety Company bound itself in a sum not to exceed $100,000 in case of any pecuniary loss occasioned plaintiff by any default of the treasurer, Kondor, in any of the respects mentioned.

Plaintiff asserts that the defendant Kondor failed and neglected to perform his duties as its treasurer in accordance with the requirements of the By-Laws of the Greek Catholic Union, and by reason of his failure and default the defendant suffered a pecuniary loss, the amount of which it seeks to recover by the present suit.

It is asserted by the plaintiff and not denied by defendant that the By-Laws of the Greek Catholic Union prevented the treasurer of the Union to carry in checking account a sum more than $25,000 beyond the amount needed

to pay the monthly death benefits due from the plaintiff to its beneficiaries, and required him to deposit all surplus funds in interest bearing accounts in safe banks, or to invest them in safe and legal bonds at the direction of the Supreme Assembly of the Union.

It is asserted by plaintiff that George Kondor, the treasurer, disobeyed the requirements of the By-Laws in this respect in that in January, February and March, 1924, he allowed more than $200,000 to accumulate in checking ac- [fol. 277] count in the Peoples State Bank of Johnstown, Pa., when the death benefits of the plaintiff during that period amounted to about $20,000 per month and the maximum amount permitted in the checking account of the Union, according to the By-Laws, would therefore be about $45,000.

Plaintiff alleges that the defendant Kondor not only failed to deposit surplus funds amounting to $150,000 or more in interest bearing accounts in safe banks, but also failed to deposit such surplus funds in checking accounts in a safe bank.

It asserts that the Peoples State Bank of Johnstown, Pa., was a bank of small capital—$50,000—and that its assets and resources were not sufficient in size or quality to make a deposit of $200,000 or $150,000 safe. It contends that the bank was in difficulties in January, February and March, 1924, and that the situation was known to the defendant Kondor as he was president of the bank.

Plaintiff claims that it has established by its testimony that the bank was in such bad condition that on April 5, 1924, it was compelled to turn over its assets and liabilities to another bank to prevent its closure and liquidation by the Banking Commissioner of the State of Pennsylvania.

In addition to foregoing defaults which have been charged by plaintiff, plaintiff charges that Kondor, as treasurer, was required by the By-Laws to promptly give out all checks signed by the president and financial secretary of the plaintiff to the persons entitled to receive them from the Union, but that in violation of such By-Laws he retained some of such checks in the months of February and March, 1924, [fol. 278] until the latter part of March, thus accumulating the amount of such checks in the checking account of the Peoples State Bank of which, as has been stated, he was

the president. It is alleged that such checks on March 31, 1924, amounted to a large sum.

A great deal of the matter alleged by the plaintiff in this case is not denied on the part of either defendant. It is admitted that Kondor was the treasurer of this society, the plaintiff society. That as such he was the principal in the bond for $100,000, of which the defendant, the American Surety Company of New York, is the surety. Perhaps with that admission the variance begins.

The American Surety Company of New York as surety bound itself by the bond, which is the basis of suit in this action, to pay to the plaintiff, the Greek Catholic Union, such pecuniary loss as it shall have sustained of money, funds, securities, or other personal property, including that for which the Order is responsible.

(A) Through fraud, dishonesty, forgery, theft, embezzlement, wrongful abstraction or wilful misapplication on the part of the defendant, George Kondor, directly or through connivance with others.

(B) Through the failure of said George Kondor faithfully to perform his duties as prescribed by the constitution and By-Laws of said Order.

(C) Through the failure of said Kondor to keep intact and absolutely to account for all funds of the Order in accordance with the constitution and By-Laws of the Order.

(D) Or through the failure of any bank or trust com-
[fol. 279] pany wherein are deposited funds for which any such officer or employee is responsible to the Order. In case of such loss the liability of the surety shall not exceed the amount of the suretyship hereunder for the officer or employee directly charged for responsibility for the funds.

In order to bind the surety, the American Surety Company of New York, defendant in this case, it is encumbent upon the plaintiff that it establish by the fair weight of the evidence that the terms of the bond were broken. That is; that George Kondor, treasurer of the plaintiff company, violated one of the four provisions against which the plaintiff was insured. As to some of them, perhaps there is no claim here. There is no direct testimony, as we understand, of any embezzlement, wrongful abstraction or wilful

misapplication on the part of the officer concerning whom the bond was given. It is charged, however, that this defendant George Kondor did not faithfully perform all his duties; that he failed to obey the By-Laws of the company in that he deposited first of all the funds of the company in a bank which was not safe—his own bank—and that he allowed, contrary to the By-Laws of the Order, those deposits in that bank to accumulate far beyond the amount which was prescribed by the rules and By-Laws of the Order; and that by reason of that default on his part the plaintiff in this case was occasioned the amount of loss which it seeks to recover in this present action.

The plaintiff also alleges, as stated, that the treasurer, the defendant Kondor, for the purpose of aiding his own [fol. 280] bank and thus endangering the plaintiff, contrary to its By-Laws, received a large number of checks upon the account of the Greek Catholic Union in his bank and instead of paying out those checks promptly, as required by the By-Laws of the Union, he withheld them, thus aiding the bank by increasing the amount of cash in its hands but endangering also the Union and causing its ultimate injury by increasing and keeping on hand a larger amount of deposits in the checking account than was prescribed by the By-Laws of the Union.

The plaintiff alleges that the actions of the defendant Kondor, his deposit of the funds of the plaintiff company in his bank which was unsafe—a safe bank may be defined a bank which is able at any time to meet its obligations—and undue accumulation of deposits in violation of the rules of the Order, occasioned them a very considerable loss; that this bank in which the funds were deposited was unsafe, as is alleged, and that it was in effect compelled to close its doors by reason of the fact that when a number of checks, checks to the amount of some eighty-nine thousand dollars, drawn by this plaintiff, were presented to it the bank was unable to make payment; that by reason of the condition of that bank, known to this defendant, the authorities of the State of Pennsylvania having charge of the State banks proposed to close the bank unless certain actions were taken to make certain the payments of obligations of the bank; that by reason of the situation created by [fol. 281] this defendant Kondor it became necessary to

turn over this bank to another bank in Johnstown, which assumed all the obligations of the State Bank of Johnstown in which the funds of the Greek Catholic Union had been deposited, with the provision, however, that this plaintiff company agreed that it leave on deposit in said bank so taking over the State Bank of Johnstown, the sum of $200,000 for a period of four years without interest.

This plaintiff alleges that in view of the situation confronting it, it entered into such an agreement, did leave its money on deposit with that bank for the period of four years without interest, and alleges that the loss of its interest upon that $200,000 was lost to it by the action of the defendant Kondor and his violation of his duty under the By-Laws of the bank. The plaintiff also seeks to recover in this action the sum of $571, interest which was paid on notes for money borrowed for the current needs of the plaintiff.

Mr. Arthur: If Your Honor please, Mr. Davis has withdrawn that.

Mr. Davis: The question Mr. Hoehrle raised was that it might be possible inasmuch as we are asking for the interest on $200,000, that this $40,000 we borrowed might be part of that.

The Court: You will ignore the claim, gentlemen of the jury, to be made for $571, but the plaintiff alleges as additional damages claimed by reason of the situation created [fol. 282] by the defendant Kondor, that the members of the Board of Trustees of the Plaintiff were required to go to Johnstown and undergo certain expenses by reason of their presence required there, and that those expenses amount to $908.93.

Mr. Davis: If Your Honor will turn to the opinion of the Circuit Court of Appeals at the last sentence of the majority opinion.

The Court: Gentlemen, you will ignore what I have said in respect to any claims in addition to the claim for loss of interest upon the deposit of $200,000 required to be kept in the United States Trust Company of Johnstown, the bank which took over the State Bank of Johnstown, at the rate of five and two-tenths per cent; that is, the total claim being for $41,600 with interest from April 7, 1938.

Mr. Davis: We had a computation that has been agreed upon by counsel.

The Court: The defendants, while admitting the official position of the defendant Kondor and the fact that he was principal and the defendant surety company surety on the bond which is in suit here, deny that the defendant Kondor violated any of his duties under the By-laws of the Greek Catholic Union in any way which made the defendant Kondor or the Surety Company, the surety on the bond, [fol. 283] liable under the bond for the amounts claimed by the plaintiff. It is claimed on behalf of the defendant that the deposits in the bank were in accordance with the By-Laws and regulations of the Order; that in no sense was the defendant Kondor responsible under the bond and, of course, if Kondor were not in violation of any of the By-Laws of the Order or of his duties as treasurer, the surety under the bond would not be liable.

It is alleged that the defendant Kondor exercised his best judgment in connection with the choice of a depository; that his deposit of the funds and his continuance of the funds in the bank was in accordance with his own best judgment; that in his opinion the State Bank of Johnstown was a safe bank and that he kept the funds there in good faith, and that none of his actions were taken for the benefit of the bank to the danger or loss of plaintiff.

The plaintiff has submitted certain points as to matters concerning which it desires me to charge you.

1. The defendant, George Kondor, was the Treasurer of the plaintiff Society, and his control of the funds in his hands as such Treasurer, was regulated and governed by the By-Laws of said Society, which By-Laws forbade him from carrying funds on checking accounts in bank to an amount greater than $25,000.00, plus such amount as was necessary for the payment of death benefits monthly; and all surplus funds above such aggregate amounts were re- [fol. 284] quired to be deposited in interest bearing deposits with safe banks, or invested in safe and legal bonds according to the discretion of the Supreme Assembly from time to time. If the jury believe from the evidence that said defendant, Kondor, did not obey said requirements of the By-Laws with respect to deposits made of the funds of the Society, but carried in checking accounts an amount materially greater than the aggregate so allowed by the By-Laws, he was guilty of a breach of his duty in said

office of Treasurer, and if the Society suffered any loss as the result of said conduct of the defendant, he is liable to make good such loss to the Society and the jury should find a verdict in favor of the plaintiff against him to the amount of the loss which the jury may find was so sustained by the Society.

That is affirmed.

2. Said defendant, George Kondor, as Treasurer of said plaintiff Society, was required by said by-laws to keep the funds of said Society, which were not invested in bonds or other accepted investments, on deposit in a safe bank or banks. By a safe bank is meant a bank whose resources are reasonably sufficient to insure that the checks drawn against said deposits will be at all times paid promptly and in full.

That is affirmed.

3. Said defendant, George Kondor, as Treasurer of said plaintiff Society, was required by said by-laws to keep the [fol. 285] funds of said Society, which were not invested in bonds or other accepted investments, on deposit in a safe bank or banks. If the jury believe from the evidence of the financial condition of the Peoples State Bank of Johnstown, the bank in which said defendant, Kondor, is shown to have deposited said funds of the plaintiff, and of which, he, himself, was President, was not a safe bank at that time, he was guilty of a breach of his duty in said office of Treasurer, and if any loss resulted therefrom he is liable to make good said loss to the plaintiff Society, and the jury should find a verdict against him for the amount of such loss as shown by the evidence.

That is affirmed.

4. If the jury believe from the evidence that it was the duty of said defendant, George Kondor, as such Treasurer, to promptly sign and forward to their proper destinations all checks or warrants duly executed by the Financial Secretary and President of the Society, and sent to said Treasurer for the purpose of making payments out of the funds of the Society in the control of said Kondor, as Treasurer; and if the jury believe that said defendant, Kondor, did not do so, but held such checks or warrants after they were so sent or given to him in his own possession and failed to

forward them to their proper destinations promptly, and that as the result of such action by him the balances on deposit in said Peoples State Bank of Johnstown were en- [fol. 286] larged, at said time, above such balances as was permitted by the by-laws to carry, if said checks had been promptly sent to their destinations, he was guilty of a breach of his duty as Treasurer of said plaintiff Society, and if any loss resulted to the Society from said conduct by the said defendant, Kondor, he is liable to make good said loss to said Society and the jury should find a verdict against him for the amount of the loss so sustained by the Society as shown by the evidence.

That is affirmed.

5. It was the duty of said defendant, George Kondor, as Treasurer of said plaintiff Society, to keep all funds of the Society intrusted to his care safely, and have said funds at all times ready to pay out upon proper warrants authenticated by the proper officers of the Society, and to well and truly keep said funds intact, and absolutely account for the same to the Society at all time, which means that he should have all such funds ready to turn over to the Society when properly called for at any time. If the jury believe from the evidence that said defendant, Kondor, did not keep funds of the Society thus intrusted to him in his office of Treasurer, safely and securely and intact, and did not well and truly account for the same when called upon by the Society, and any loss was sustained by the Society by reason of said conduct on his part, he is liable to make good to [fol. 287] the Society the amount of loss so sustained, and the jury should find a verdict against him for the amount of said loss as shown by the evidence.

That is affirmed.

6. The defendant, the American Surety Company of New York, contracted with the plaintiff Society to insure it, the said plaintiff Society, against defaults of said defendant, George Kondor, as Treasurer of said Society, such as are charged against him in this case, and undertook to pay to said Society such pecuniary loss as it should sustain as the result of defaults in the discharge of his duties as Treasurer by said George Kondor, and if the jury believe that by rea-

son of any such defaults by said defendant, Kondor, any pecuniary loss was sustained by said plaintiff, which said George Kondor has not made good, the jury should find a verdict against said American Surety Company for the amount of such loss as shown by the evidence in this case.

That is affirmed.

The seventh point is refused and not read.

8. If the jury believe from the evidence that the American Surety Company was liable to the Greek Catholic Union, under its surety contract for the loss suffered by the default of its Treasurer, the agreement entered into between the Greek Catholic Union and the United States Trust Company [fol. 288] of Johnstown, Pennsylvania, did not relieve or release the American Surety Company from such liability, unless the jury find that the latter agreement created a material variation, or was a substantial change of said surety contract which change made the Surety Company's risk of loss greater than it would have been if said agreement had not been made.

That is affirmed.

9. If the jury believe from the evidence that the American Surety Company did not sustain any actual substantial loss as the result of the fact that the agreement was made between the plaintiff and the United States Trust Company of Johnstown, then the fact that said agreement was made affords the American Surety Company no ground of defense in this case, and the jury should find for the plaintiff the amount of such loss as it finds from the evidence was sustained by the plaintiff as the result of the defaults of George Kondor, the Treasurer, whose fidelity in said office of Treasurer was insured to the plaintiff by the bond of said Surety Company, up to the amount of said bond.

That is affirmed.

The tenth point is refused and not read.

The defendant has also submitted three points, each of which are refused and not read.

Has there been any omission to which counsel for either side desires the attention of the jury be called?

[fol. 289] Mr. Arthur: If Your Honor please, I would like to ask the Court—I should probably have embraced this in

my points—I would like to ask the Court to charge that in view of the evidence in this case the burden is on the plaintiff to show that the defendant was not prejudiced by the subsequent agreement that was made, whereby the defendant was prevented from recovering its salvage.

The Court: Submit an additional point, and then I will say I refuse that point, making it the fourth point.

Mr. Davis: We want to note an exception to the refusal of the plaintiff's seventh and tenth points.

The Court: We will enter an exception to the plaintiff to the refusal of such of plaintiff's points as are refused, and to the affirmance of such — defendant's points as are affirmed; and we note an exception to the defendant to the refusal of such of defendant's points as are refused, and to the affirmance of such of plaintiff's points as are affirmed.

The Court: Gentlemen, a calculation will be sent out with papers in the case that that is not a calculation which has been agreed to by the parties as being correct, simply a [fol. 290] calculation which is correct, provided you find the facts in this case as they are asserted by the plaintiff. If you do not find the facts as asserted by the plaintiff, of course your verdict will not, and cannot, be in accordance with that calculation.

PLAINTIFF'S POINTS REFUSED AND NOT READ

7. By its contract with the plaintiff Society, said defendant, the American Surety Company of New York, bound itself to pay to said Society any pecuniary loss which it should sustain by reason of the failure of any bank in which funds of the Society were deposited by said Treasurer. If the jury believe from the evidence that the Peoples State Bank of Johnstown, Pennsylvania, in which the funds of the plaintiff Society were deposited by said defendant, Kondor, as Treasurer, was, on or about April 1, 1924, in such financial condition that it was unable to pay back to the plaintiff and its other depositors the amounts of their deposits promptly and in full, upon demand, and that by reason of said condition, the business of said Bank was directly thereafter taken over by the United States Trust Company of Johnstown, Pennsylvania, by arrangement sanctioned by the Pennsylvania State Commissioner of

Banking, and was thereafter closed and its affairs wound up by said United States Trust Company, said situation amounted to failure of said Peoples State Bank, and if any [fol. 291] pecuniary loss was sustained by the plaintiff Society as a result of said failure, then the jury should find a verdict for the plaintiff against said American Surety Company of New York for the amount of the loss so sustained as shown by the evidence.

10. The contract of insurance by the defendant, the American Surety Company of New York, was not violated, nor was said defendant relieved or released from its liability under said contract, by reason of the fact that the plaintiff, in the emergency which arose with respect to the affairs of the Peoples State Bank in which its funds were deposited by said defendant, Kondor as Treasurer, entered into the agreement which was made by which the United States Trust Company took over the business and affairs of the said Peoples State Bank and undertook to pay the depositors of that Bank, if that arrangement and agreement was made in good faith with the intention and purpose to reduce the loss which was about to be sustained in the situation, and would be for the benefit of both the insurer and the insured; and such loss as necessarily resulted to the plaintiff from that agreement can be recovered by it from the said American Surety Company, defendant, up to the amount of the contracted liability of said defendant.

[fol. 292] DEFENDANT'S POINTS REFUSED AND NOT READ

1. That under all the evidence the verdict should be for the defendant, American Surety Company of New York.

2. If the jury believes from the evidence that the Supreme Assembly of the Greek Catholic Union had control of the funds of the Union and had full knowledge of the accounts of its treasurer and of the moneys on deposit in the Peoples State Bank at Johnstown and exercised dominion over said funds and the withdrawals from time to time made therefrom, the acquies-ence and consent of the said Supreme Assembly will be presumed and the loss, if any, of the Union by reason of accumulations of funds in

said depository would be chargeable to the Supreme Assembly and not to the treasurer, Kondor.

3. If the Jury believes from the evidence that the Supreme Financial Secretary and the Supreme President of the plaintiff Union were informed from time to time of the amount on deposit in the fund of the treasurer in the Peoples State Bank at Johnstown, and took no steps to reduce said deposits, and that by reason of the accumulation of deposits in said depository, loss accrued to the plaintiff Union, said loss would not be chargeable to defendant, George Kondor.

4. The agreement between the plaintiff Union and the United States Trust Company of Johnstown having effected material variance in defendant's contract of surety-[fol. 293] ship and having permitted the affairs of Peoples State Bank to be liquidated and its assets collected by said Trust Company instead of a Receiver to be appointed by the Banking Department of the State of Pennsylvania, removed from defendant Surety Company all possibility of participation in any salvage therefrom, and of proving said variance to have been prejudicial and said defendant is thereby relieved of the burden of showing that said variance was prejudicial to it.

After hearing all of the evidence, the arguments of counsel and the charge of the Court, the jury retired to consider their verdict and on May 8, 1930, returned a verdict in favor of the plaintiff in the sum of Forty-six Thousand Eight Hundred and 00/100 ($46,800.00) Dollars, as follows:

VERDICT—Filed May 8, 1930

And now, to wit, May 8, 1930, we, the Jurors empaneled in the above-entitled case, find a verdict in favor of the Plaintiff in the amount of $46,800.00.

John Guthrie, Foreman.

[fol. 294] The defendants afterward, to-wit, May 12th, 1930, filed a motion and reasons for new trial as follows:

MOTION FOR NEW TRIAL

And now, to-wit, May 12th, 1930, defendants by their attorneys move the Court for a new trial in the above stated case for the following reasons:

First. The Court erred in affirming plaintiff's first, second, third, fourth, fifth, sixth, eighth, ninth and tenth points.

Second. The Court erred in refusing defendant's first, second, third and fourth points.

Third. The Court erred in admitting in evidence plaintiff's Exhibit No. F being agreement between The Greek Catholic Union and United States Trust Company, and evidence concerning said agreement and the adoption thereof.

Fourth. The verdict was against the weight of the evidence.

J. M. Magee, Robert Hoehrle, E. W. Arthur, Attorneys for Defendants.

[fol. 295] Thereafter said motion was argued and on September 15th, 1930, an order was entered by the Court refusing motion and with opinion filed, which opinion and order are as follows:

OPINION—Filed September 15, 1930

GIBSON, District Judge:

The defendants, after verdict against them, have moved for a new trial. The substantial reason assigned in support of the motion was the alleged error of the Court in charging the jury in accordance with certain points submitted by the plaintiff and in refusing to charge in accordance with points submitted by the defendants. Defendants further allege error of the Court in allowing the introduction of a certain agreement between the plaintiff and the United States Trust Company. The admission of this agreement was correct if the Court was not in error in affirming plaintiff's points and refusing those of the defendants.

After the plaintiff had filed its statement of claim the American Surety Company of New York, one of the defendants, filed its affidavit of defense raising questions of law. Judgment was rendered thereon by the District Court in favor of the defendants. Thereupon the plaintiff appealed and the matter was heard by the Circuit Court of Appeals, which reversed the judgment and remitted the case for trial. See: Greek Catholic Union v. American Surety Co. of New York, 25 Fed. Rep. (2d) 31.

In submitting the case to the jury upon subsequent trial [fol. 296] the Trial Judge endeavored to follow the propositions laid down in the majority opinion of the Circuit Court of Appeals. We are of opinion that the points submitted by the plaintiff and defendants were respectively affirmed and refused in accordance with such propositions. The motion for a new trial must therefore be refused.

Order of Court

And now, to wit, September 15, 1930, the motion of the defendants for a new trial in the above entitled cause is refused.

Per Curiam.

G.

Whereupon September 15th, 1930, upon præcipe filed, judgment was entered in favor of The Greek Catholic Union and against American Surety Company of New York and George Kondor in the sum of Forty-seven Thousand Eight Hundred Six and 20/100 Dollars liquidated as follows:

JUDGMENT

Sept. 16, 1930.

Pursuant to præcipe filed, judgment is hereby entered in favor of The Greek Catholic Union and against American Surety Co. of New York and George Kondor in the sum of $47,806.20, liquidated as follows:

Amount of verdict	$46,800.00
Interest from May 8, 1930	1,006.20
Total	$47,806.20

J. Wood Clark, Clerk.

[fol. 297] ORDER SETTLING BILL OF EXCEPTIONS

And now, in furtherance of justice and that right may be done, and inasmuch as the matters and things above set forth do not appear of record in said cause, and to the end that the same may be preserved in the record and transmitted to the Honorable the United States Circuit Court of Appeals, the defendant presents the foregoing testimony, exhibits, charge of the Court, plaintiff's and defendant's points, verdict and judgment, including the rulings of the Court upon the evidence and upon the points of law submitted and exceptions taken thereto, as its Bill of Exceptions in this cause and prays that the same may be allowed, settled, signed, sealed, made a part of the record and ordered to be filed, which is accordingly done this 21st day of January, 1931, after presentation to opposing counsel for examination and within the period in which an appeal may lie from the judgment of the Court in this cause rendered and entered.

R. M. Gibson, Judge of the District Court of the United States for the Western District of Pennsylvania.

Examined and approved this 21st day of January, 1931.

T. S. & O. W. Brown, Ralph C. Davis, Attorneys for Plaintiff.

[fol. 298] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR

And now, to-wit, December 26th, 1930, defendants by their counsel assign error as follows to the rulings of the Court in the above stated case:

First. The Court erred in its answer to plaintiff's first point, which point and the answer thereto are as follows:

1. The defendant, George Kondor, was the Treasurer of the plaintiff Society, and his control of the funds in his hands as such Treasurer, was regulated and governed by the By-Laws of said Society, which By-Laws forbade him from carrying funds on checking accounts in bank to an amount greater than $25000.00, plus such amount as was necessary for the payment of death benefits monthly; and

all surplus funds above such aggregate amounts were required to be deposited in interest in bearing deposits with safe banks, or invested in safe and legal bonds according to the discretion of the Supreme Assembly from time to time. If the jury believe from the evidence that said defendant, Kondor, did not obey said requirements of the By-Laws with respect to deposits made of the funds of the Society, but carried in checking accounts an amount materially greater than the aggregate so allowed by the By-Laws, he was guilty of a breach of his duty in said office of Treasurer, and if the Society suffered any loss as the result of said conduct of the defendant, he is liable to make good such loss to the Society and the jury should find a [fol. 299] verdict in favor of the plaintiff against him to the amount of the loss which the jury may find was so sustained by the Society.

By the Court: That is affirmed.

Second. The Court erred in its answer to plaintiff's fifth point, which point and the answer thereto are as follows:

5. It was the duty of said defendant, George Kondor, as Treasurer of said plaintiff Society to keep all funds of the Society intrusted to his care safely, and have said funds at all times ready to pay out upon proper warrants authenticated by the proper officers of the Society, and to well and truly keep said funds intact, and absolutely account for the same to the Society at all times, which means that he should have all such funds ready to turn over to the Society when properly called for at any time. If the jury believe from the evidence that said defendant, Kondor, did not keep funds of the Society thus intrusted to him in his office of Treasurer safely and securely and intact, and did not well and truly account for the same when called upon by the Society, and any loss was sustained by the Society by reason of said conduct on his part, he is liable to make good to the Society the amount of loss so sustained, and the jury should find a verdict against him for the amount of said loss as shown by the evidence.

By the Court: That is Affirmed.

[fol. 300] Third. The Court erred in its answer to plaintiff's eighth point, which point and the answer thereto are as follows:

8. If the jury believe from the evidence that the American Surety Company was liable to the Greek Catholic Union, under its surety contract for the loss suffered by the default of its Treasurer, the agreement entered into between the Greek Catholic Union and the Unted States Trust Company of Johnstown, Pennsylvania, did not relieve or release the American Surety Company from such liability, unless the jury find that the latter agreement created a material variation, or was a substantial change of said surety contract which change made the Surety Company's risk of loss greater than it would have been if said agreement had not been made.

By the Court: That is Affirmed.

Fourth. The Court erred in its answer to plaintiff's ninth point, which point and the answer thereto are as follows:

9. If the jury believe from the evidence that the American Surety Company did not sustain any actual substantial loss as the result of the fact that the agreement was made between the plaintiff and the United States Trust Company of Johnstown, then the fact that said agreement was made affords the American Surety Company no ground of defense in this case, and the jury should find [fol. 301] for the plaintiff the amount of such loss as it finds from the evidence was sustained by the plaintiff as the result of the defaults of George Kondor, the Treasurer, whose fidelity in said office of Treasurer was insured to the plaintiff by the bond of said Surety Company, up to the amount of said bond.

By the Court: That is Affirmed.

Fifth. The Court erred in its answer to defendant's first point, which point and the answer thereto are as follows:

1. That under all the evidence the verdict should be for the defendant, American Surety Company of New York.

By the Court: That is refused.

Sixth. The Court erred in its answer to defendant's second point which point and answer thereto are as follows:

2. If the jury believes from the evidence that the Supreme Assembly of the Greek Catholic Union had control

of the funds of the Union and had full knowledge of the accounts of its treasurer and of the moneys on deposit in the Peoples State Bank at Johnstown and exercised dominion over said funds and the withdrawals from time to time made therefrom, the acquiescence and consent of the said Supreme Assembly will be presumed and the loss, if any, of the Union by reason of accumulations of funds [fol. 302] in said depository would be chargeable to the Supreme Assembly and not to the treasurer, Kondor.

By the Court: That is refused.

Seventh. The Court erred in its answer to defendant's third point, which point and the answer thereto are as follows:

3. If the Jury believes from the evidence that the Supreme Financial Secretary and the Supreme President of the plaintiff Union were informed from time to time of the amount on deposit in the fund of the treasurer in the Peoples State Bank at Johnstown, and took no steps to reduce said deposits, and that by reason of the accumulation of deposits in said depository, loss accrued to the plaintiff Union, said loss would not be chargeable to defendant, George Kondor.

By the Court: That is refused.

Eighth. The Court erred in its answer to defendant's fourth point, which point and the answer thereto are as follows:

4. The agreement between the plaintiff Union and the United States Trust Company of Johnstown having effected material variance in defendant's contract of suretyship and having permitted the affairs of Peoples State Bank to be liquidated and its assets collected by said Trust [fol. 303] Company instead of a Receiver to be appointed by the Banking Department of the State of Pennsylvania, removed from defendant Surety Company all possibility of participation in any salvage therefrom, and of proving said variance to have been prejudicial and said defendant is thereby relieved of the burden of showing that said variance was prejudicial to it.

By the Court: That is refused.

In United States District Court

Stipulation of Counsel as to Printing of Record

It is agreed by the attorney for Plaintiff and Defendant that the following may be printed as the record in the appeal taken in the above stated case:

1. Docket Entries.
2. Pleadings as follows:
(a) Amended statement;
(b) Affidavit of Defense of American Surety Company of New York;
(c) Affidavit of Defense of George Kondor.
3. Record:
(a) Testimony.
(b) Plaintiff's Exhibits "B" to "F", inclusive;
(c) Defendant's Exhibit No. 2.
4. Charge of Court.
5. Plaintiff's points.
6. Defendant's points.
7. Verdict.

[fol. 304] 8. Motions and Reasons for new trial.
9. Opinion and Order refusing new trial.
10. Judgment.
11. Assignments of Error.

It is stipulated by and between counsel for the respective parties with the approval of the Court that the stenographer's notes of evidence, proceedings at the trial, charge of the Court, points or request to charge submitted by the respective parties, and the exceptions taken thereto as filed of record in this case, and the exhibits transcribed therein shall be printed and treated as a part of this Bill of Exceptions without the necessity of re-copying the same therein.

Plaintiff's Exhibit "G" consists of eleven (11) checks dated March 29th, 1924, signed by George Komlas as Treasurer and signed and countersigned in due form by other authorized officers of Greek Catholic Union amounting to the sum of $89,538.50.

Plaintiff's Exhibit "H" consists of sixteen (16) checks dated from February 27th, 1926 to March 21st, 1924, signed by various officers of Greek Catholic Union amounting to the sum of $4,341.26.

Exhibit No. 2 offered in evidence but not transcribed by the Court stenographer in the foregoing transcript of testimony is herewith separately appended to said testimony as though incorporated therein.

It is further stipulated, subject to the approval of the Court, that all evidence and testimony pertinent to each and every of the exceptions hereinbefore set forth and all offers and proposals thereof in detail and objections thereto, and [fol. 305] rules of the Court thereon, and other matters pertinent thereto appearing in the notes of the proceedings of the trial, shall be treated as a part of each and every of such exceptions with like force and effect as if each of said exceptions and all matters pertinent thereto were separate and expressly set forth and sealed as and for a separate exception.

This stipulation to be treated as if made in connection with each and every exception to which it is or may be pertinent.

T. S. & O. W. Brown, Ralph C. Davis, Attorneys for Plaintiff. J. M. Magee, E. W. Arthur, Attorneys for Defendant.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 306] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1931

No. 4537 (List No. 24)

AMERICAN SURETY CO., et al., Appellants,

vs.

GREEK CATHOLIC UNION, Appellee

ORDER ASSIGNING JUDGE—March 5, 1931

On Appeal from the District Court of the United States for the Western District of Pennsylvania

And now, to-wit, this 5th day of March, A. D. 1931, it is ordered that Hon. W. H. S. Thomson, District Judge for

the Western District of Pennsylvania, be, and he is hereby, assigned to sit in above case in order to make a full court.

Joseph Buffington, Circuit Judge.

[File endorsement omitted.]

[fol. 307]. In United States Circuit Court of Appeals for the Third Circuit, March Term, 1931

No. 4537

American Surety Company of New York and George Kondor, Defendants-Appellants,

v.

The Greek Catholic Union, Plaintiff-Appelleee

Appeal from the District Court of the United States for the Western District of Pennsylvania

Before Buffington and Thompson, Circuit Judges, and Thomson, District Judge

Opinion—Filed August 14, 1931

Buffington, J.:

This case was heretofore before this Court. Reference to 25 Fed. Rep. (2d) 31 will explain its facts and obviate present repetition. Suffice to say the suit was by The Greek Catholic Union, here referred to as the Union, against George Kondor and the American Surety Company, hereafter called the surety, on its fidelity bond for Kondor. In that case the judgment in favor of the defendants was reversed and a new trial ordered. On the retrial a verdict was found in favor of the Union and, on [fol. 308] entry of judgment thereon, defendants took this appeal.

The former opinion fully discussed the alleged facts and set forth the legal principles to be applied in the case on retrial. We assume, as did the Court below, that decision settled the law of the case. So regarding it, we decline to review such decision, and limit ourselves to inquiring

whether the rulings of the trial Judge were in accord with our former decision.

Naturally, the first and basic question to be determined by the jury was whether Kondor had, prior to April 4, 1924, breached the provisions of the surety bond. This issue of fact was so explained at length and in detail to the jury in the Judge's charge that when the Court, at its close, inquired whether "there had been any omission to which counsel for either side desires the attention of the jury be called," there was no complaint. We therefore accept the finding of the jury that the bond was breached.

Such being the case, the next question was whether, after such breach, the Union released the Surety by making the arrangement with the Trust Company of Johnstown. That depended on the answer to the further question whether the arrangement worked any injury to the Surety or made its loss greater than it would have been if the arrangement had not been made. In that respect the Court, in accordance with our holding when the case was here before, charged:

"8. If the jury believe from the evidence that the American Surety Company was liable to the Greek Catholic Union, under its surety contract for the loss suffered by the default of its Treasurer, the agreement entered into between the Greek Catholic Union and the United States Trust Company of Johnstown, Pennsylvania, did not relieve or release the American Surety Company from such liability, unless the jury find that the latter agreement created a material variation, or was a substantial change [fol. 309] of said surety contract which change made the Surety Company's risk of loss greater than it would have been if said agreement had not been made. That is Affirmed."

On these questions the jury found for the Union. Such being the course of the trial, the trial Judge following the principles laid down by this Court and the jury finding all the pertinent issues of fact for the plaintiff, we are of opinion no error is shown and the judgment below is affirmed.

A true Copy. Teste:

——— ———, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 310] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1931

No. 4537 (List No. 24)

AMERICAN SURETY CO. et al., Appellants,

vs.

GREEK CATHOLIC UNION, Appellee

JUDGMENT—Filed Aug. 14, 1931

On Appeal from the District Court of the United States for the Western District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States for the Western District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed, with costs.

Philadelphia, August 14, 1931.

Per Curiam:

Buffington, Circuit Judge.

[File endorsement omitted.]

[fol. 311] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 312] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 2, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,215. U. S. Circuit Court of Appeals, Third Circuit. Term No. 401. American Surety Company of New York, petitioner, vs. The Greek Catholic Union. Petition for a writ of certiorari and exhibit thereto. Filed September 22, 1931. File No. 36,215.

FILE COPY

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CHARLES ELMORE CRO
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 401

AMERICAN SURETY COMPANY OF NEW YORK,
PETITIONER,

vs.

THE GREEK CATHOLIC UNION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JAMES M. MAGEE,
Counsel for Petitioner.

EDMUND W. ARTHUR,
Of Counsel.

(36,215)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 401

AMERICAN SURETY COMPANY OF NEW YORK,
PETITIONER,

vs.

THE GREEK CATHOLIC UNION.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Justices of said Court:

The petition of American Surety Company of New York respectfully sets forth:

Summary Statement of the Matter Involved.

THE QUESTIONS PRESENTED.

1. Whether a surety for compensation upon a treasurer's bond covering *inter alia* his selection of depository is liable as an insurer for subsequent loss of interest on a deposit sustained by the obligee where, after

breach of bond, said obligee, in an effort to minimize an anticipated probable loss through failure of depository, entered into an agreement with a new depository to waive interest on its deposit for four years as an inducement to the new depository to take over the business of the former one and avert its failure, said agreement having been entered into without notice to the surety and involving the consequent destruction of the surety's right of subrogation and of the possibility of proving the variance in the risk prejudicial.

2. Whether in such case the loss sustained was due to cause beyond the scope of the bond.

THE ESSENTIAL FACTS.

This action arose by suit in assumpsit against George Kondor, principal, and American Surety Company of New York, surety upon his bond as treasurer of The Greek Catholic Union, a beneficial society organized under the laws of the Commonwealth of Pennsylvania.

The bond guaranteed the fidelity of Kondor, bound the obligors to pay loss due *inter alia* (*a*) to failure of principal to perform his duties as prescribed by the constitution and by-laws of the order, (*b*) to failure to keep intact and account for funds in accordance with the constitution and by-laws, and (*c*) failure of depository.

It was alleged, and by jury found that Kondor had breached his bond, the specific charge being that he had carried on deposit at Johnstown, Pennsylvania,

in a bank of which he was treasurer, an aggregate amount in excess of the limit allowed by the by-laws and excessive in proportion to the assets of the depository bank.

This bank came into financial difficulties. Upon an examination by the banking department of the State of Pennsylvania, its officers were notified on a Friday or Saturday that unless indicated steps were taken to correct its condition it would not be permitted to open on the following Monday. The officers of various banks in the city conferred with a view to averting failure of the depository. Finally, as an inducement to a trust company to take over and conduct the business of the depository bank, The Greek Catholic Union, obligee of the bond in suit, agreed in writing to allow two hundred thousand ($200,000.00) dollars to remain on deposit with the trust company for a period of four years without interest unless within that period there was realized from the assets of the depository an amount sufficient to pay all its depository liability. This agreement was made without knowledge or consent of the surety and following it the business of the depository was transferred to and continued by the trust company without interruption and without the payment of interest to the fraternal society.

The alleged loss which the jury was permitted to consider and for which the verdict was rendered was the amount of interest on this deposit of two hundred thousand ($200,000.00) dollars figured at five and two-tenths (5.2) per centum, with interest thereon from date of claim.

Judgment on the pleadings was entered in favor of the American Surety Company of New York, the surety, by the District Court in accordance with practice under the law of Pennsylvania (R. 7). This was reversed by the Circuit Court of Appeals (R. 2) in an opinion by Buffington, J., in which Davis, J., concurred, Woolley, J., filing a dissenting opinion, 25 Fed. (2d) 31. The case being remanded for further proceedings, on the first trial the jury disagreed (R. 3), on second trial a verdict was rendered in favor of the plaintiff for forty-six thousand eight hundred ($46,800.00) dollars (R. 3), from judgment on which entered against both defendants an appeal was taken.

On argument, the Circuit Court of Appeals affirmed the judgment of the District Court. Petitioner now seeks a review of that affirmance as to the surety.

Reasons Relied on for the Allowance of the Writ.

The rulings of the court below if allowed to stand will

(*a*) Largely unsettle the law of suretyship by introduction of a radical relaxation of a well established rule.

(*b*) Add an additional burden uncontemplated and uncompensated to millions of dollars of outstanding fidelity insurance written upon the basis of pre-existing law; and

(*c*) Add confusion to the law of suretyship by permitting, without consent of a surety, the

addition of new speculative risks which cannot be specified in advance or anticipated, resulting in general unsettlement of the schedules of rates of all commercial companies, to the discouragement of a business the sphere of which is rapidly increasing in importance.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Third Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 4537, AMERICAN SURETY COMPANY OF NEW YORK and GEORGE KONDOR, appellants, *vs.* THE GREEK CATHOLIC UNION, appellee, and that the said judgment of the Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioner will ever pray.

AMERICAN SURETY COMPANY OF NEW YORK,
By JAMES M. MAGEE,
Counsel for Petitioner.

EDMUND W. ARTHUR,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 401

AMERICAN SURETY COMPANY OF NEW YORK

vs.

THE GREEK CATHOLIC UNION.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals when the case was before it on judgment on the pleadings was written by Buffington, Circ. J., Davis, Circ. J., concurring. Woolley, Circ. J., wrote a dissenting opinion. These are reported in 25 Fed. (2d) 31.

The opinion of the same court in the second appeal, adopting without restating the statement of law made in the former opinion, was written by Buffington, Circ. J., Thomson and Thompson, Circ. JJ., concurring, and was filed August 14, 1931 (R. 307).

Jurisdiction.

(*a*) It is believed that the jurisdiction upon writ herein prayed for is sustained by Section 240 of the Judicial Code as amended by Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938 (U. S. Code, p. 906, sec. 347).

(*b*) The date of the judgment to be reviewed is August 14, 1931 (R. 310).

Statement of the Case.

A full statement of the case appears in the petition. In the interest of brevity it is referred to without repeating at this point.

Reference, however, is made for emphasis to the facts—

(*a*) That a variance of the risk was accomplished by the obligee without the knowledge or consent of the surety;

(*b*) That obligee substituted a fixed certain loss for an uncertain probable loss;

(*c*) That by the action of the obligee the surety was deprived of its right of subrogation, its opportunity for salvage, and the possibility of proving the variance prejudicial.

Specification of Assigned Errors.

1. The Circuit Court of Appeals erred in refusing to find and hold that under all the evidence the verdict should have been for the surety defendant.

2. The Circuit Court of Appeals erred in refusing to find and hold that the material variance of the risk insured by appellant, whereby a new hazard not covered by the bond was sought to be imposed upon appellant and it was deprived of opportunity both for subrogation and for obtaining proof that the variance was prejudicial, constituted a full defense to the claim against the surety.

That is to say:

3. The Circuit Court of Appeals erred in refusing to sustain appellant's 3rd (R. 300), 5th (R. 301), and 8th (R. 302) assignments of error.

The opinion (R. 309) concludes—"We are of opinion no error is shown and the judgment below is affirmed."

ARGUMENT.

Summary.

A. Importance of the business affected.

B. The decision of the Circuit Court of Appeals, if allowed to stand, will unsettle the law of suretyship by introducing a new and radical relaxation of the rule of *strictissimi juris* as applied to surety for compensation.

(1) By permitting material variance or substitution of new risk without consent of the surety.

(2) By making surety liable without its consent for loss due to cause beyond the scope of the bond.

(3) By throwing upon a surety defending on the ground of material variance of the risk by the obligee the burden of proving the variance prejudicial, though the action of the obligee has destroyed all possibility of such proof.

C. Reference to authorities.

Point A.

The requirements of modern business for fidelity and similar suretyship have exceeded for many years the possibility of being met by individual sureties. Business, law and the social organization in general demand a form of insurance which is being supplied ever in greater measure by a large number of commercial surety companies. There is today outstanding millions of dollars of fidelity insurance written in contemplation of the legal requirements and interpretation heretofore current. It is common knowledge that the rates charged by way of premium have been calculated in an amount necessary to set up a legal reserve against the hazard and compensation for the service.

Point B—General.

The questions presented by this case are, we believe, new to the body of surety law. They arise and find their large importance in the evolution of this law to fit the case of the compensated surety. The rule of *strictissimi juris* as applied to the individual surety has been gradually and increasingly relaxed in the case of surety for compensation. The ruling in the

instant case carries this relaxation beyond a danger point, in that it adds an additional hazard uncontemplated when the insurance was written and constitutes a burden against which the insurers are not secured and for the assumption of which they are not compensated. Its affirmance must be highly injurious to many and possibly disastrous to some surety companies through inability to cover the increased hazard on outstanding insurance. It must be, in a measure, subversive of the usefulness of the compensated surety generally through increase of expense to patrons, disturbance of schedules and uncertainty of risk, the cost of insuring which can be actuarily ascertained, if at all, only after long years of experience.

Point B (1) and (2).

By the terms of its bond petitioner assured The Greek Catholic Union against loss through misconduct of the treasurer, or failure to perform the duties prescribed, or through failure of the depository.

Assuming the bond to have been breached by the misconduct and default of the principal, the Union, to avert an anticipated probable loss through threatened failure of the depository, entered into an agreement to accept a fixed certain loss as an inducement to another bank to take over the depository. Here was a material variance in the contract: The substitution of a new risk without consent of the surety, followed by an effort to hold the surety liable for the loss sustained by the Union through its own act, a cause beyond the scope of the bond.

Point B (3).

The merger of the failing depository and the continuance without interruption of its business in the hands of the merging bank deprived the surety of any right of subrogation, of any salvage through participation in the distribution of assets, and of any possibility of ever proving that by other management loss might have been averted. To hold that in such case the surety must prove that it was prejudiced by the voluntary act of the obligee seeking its own advantage is to tear down the security of a definite contract and to impose upon the surety a task beyond the power of even a modern Hercules to perform, that is, "to prove the consequences of a thing that never happened."

Counsel for petitioner respectfully refer to the dissenting opinion of His Honor, Judge Woolley, when this case was first before the Circuit Court of Appeals as expressing in concise, vigorous and cogent language the position of your petitioner, *then* upon the facts disclosed by the readings, and *now* upon the facts disclosed by the evidence (see 25 Fed. (2d) 31).

Point C.

That the decisions of your Honorable Court have never contemplated such a radical and disturbing innovation in the law of suretyship may be indicated by the language of the following decisions:

Guarantee Company of N. A. vs. Mechanics' Savings B. & T. Co., 183 U. S. 402 (1902), Fuller, C. J.

There the court, in commenting on the decision in *American Surety Company vs. Pauly*, 170 U. S. 133,

on the subject of fidelity insurance and the rule of construction of a policy in favor of the insured, remarks (opinion p. 419):

> "But this rule cannot be availed of to refine away terms of a contract expressed with sufficient clearness to convey the plain meaning of the parties, and embodying requirements compliance with which is made the condition to liability thereon."
>
> *United States Fidelity & Guaranty Co. vs. Pressed Brick Co.*, 191 U. S. 416 (1903).

Mr. Justice Brown in discussing in the opinion of the court the application to surety bonds of the rule of *strictissimi juris* and its relaxation in the case of the compensated surety used the following language: (P. 426

> "The facts of this case do not call for an expression of opinion as to whether, if an unusual credit were given, and in the meantime the principal obligor had become insolvent, or the surety were otherwise damnified by the delay, it might not be exonerated, since neither of these contingencies supervened in this case, and we are remitted to the naked proposition whether the giving of a customary credit, with no evidence of loss thereby occasioned, is sufficient to discharge the surety. We find no difficulty whatever in answering this question in the negative. The rule of *strictissimi juris* is a stringent one, and is liable at times to work

> practical injustice. It is one which ought not to be extended to contracts not within the reason of the rule, particularly when the bond is underwritten by a corporation which has undertaken for a profit to insure the obligee against a failure or performance on the part of the principal obligor. Such a contract should be interpreted liberally in favor of the subcontractor, with a view of furthering the beneficent object of the statute. Of course, this rule would not extend to cases of fraud or unfair dealing on the part of the subcontractor, as was the case in United States use of Heise *v.* American Bonding & T. Co., 89 Fed. 921, 925, or to cases not otherwise within the scope of the undertaking."

It is respectfully submitted that in the case at bar the measure of liability sought to be imposed upon the surety is not within the scope of its undertaking.

The Supreme Court of Pennsylvania whose decisions have been quite generous toward the insured, nevertheless has said in

Young vs. American Bonding Company, 228 Pa 373 (1910),

in opinion by Mr. Justice Stewart:

> "In all essential particulars the Appellee here is an insurance company, and its obligation in this particular instance was that of an insurer. It was paid for its undertaking; the amount of its compensation being based on the calculation of risk assumed.
>
> It follows that there is but one way by which it is to be determined whether the variance complained of was a material variance. The test

is to be found in answer to the question, whether it substantially increased the chances of the loss insured against. If such were the result it would have been fair reason for demanding a higher premium than was paid and the materiality is thus made apparent. (Citations.) It is not a question whether the variance actually caused the breach of the bond; but whether it was such a variance as a reasonably careful and prudent person undertaking the risk would have regarded as substantially increasing the chances of loss."

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by your Honorable Court of its supervisory powers in order that this important question of general law may be settled and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals and finally reverse it.

JAMES M. MAGEE,
Counsel for Petitioner.
EDMUND W. ARTHUR,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1931.

NO. 401.

AMERICAN SURETY COMPANY OF NEW YORK,
Petitioner,

v.

THE GREEK CATHOLIC UNION.

BRIEF OF PETITIONER ON QUESTIONS RAISED ON CERTIORARI.

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Supreme Court of the United States

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AMERICAN SURETY COMPANY OF NEW YORK,
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THE GREEK CATHOLIC UNION.

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OPINIONS OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals when the case was before it on judgment on the pleadings was written by Buffington, Circ. J., Davis, Circ. J., concurring. Woolley, Circ. J., wrote a dissenting opinion. These are reported in 25 Fed. (2d) 31.

The opinion of the same court in the second appeal, adopting without restating the statement of law made in the former opinion, was written by Buffington, Circ. J., Thomson and Thompson, Dist. JJ., concurring. It is reported in 51 Fed (2d) 1050.

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED.

1. The date of the judgment to be reviewed is August 14th, 1931.

2. The petitioner contends that the court below has decided an important question of general law in a way probably untenable or in conflict with the weight of authority. The specific rulings of the lower court relied upon as a basis of the jurisdiction of your Honorable Court are the refusal of the Circuit Court of Appeals to sustain plaintiff's 3rd (R. 201), 5th (R. 202) and 8th (R. 203) assignments of error.

It is believed that the jurisdiction upon this writ is sustained by Section 240 of the Judicial Code as amended by Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938 (U. S. Code, p. 906, Sec. 347).

CONCISE STATEMENT OF THE CASE.

The Questions Presented.

1. Whether a surety for compensation upon a treasurer's bond covering *inter alia* his selection of depository is liable as an insurer for subsequent loss of interest on a deposit sustained by the obligee where, after breach of bond, said obligee, in an effort to minimize an anticipated probable loss through failure of depository, entered into an agreement with a new depository to waive interest on its deposit for four years as an inducement to the new depository to take over the business of the former one and avert its failure, said agreement having been entered into without notice to the surety and involving the consequent destruction of the surety's right of subrogation and of the possibility of proving the variance in the risk prejudicial.

2. Whether in such case the loss sustained was due to cause beyond the scope of the bond.

Essential Facts.

This action was begun by suit in assumpsit against George Kondor, principal, and American Surety Company of New York, surety upon his bond as treasurer of The Greek Catholic Union, a beneficial society organized under the laws of the Commonwealth of Pennsylvania.

The bond (R. 35) guaranteed the fidelity of Kondor, bound the obligors to pay loss due *inter alia* (a) to failure of principal to perform his duties as prescribed by the constitution and by-laws of the order, (b) to failure to keep intact and account for funds in accordance with the constitution and by-laws, and (c) failure of depository.

It was alleged, and by jury found, that Kondor had breached his bond, the specific charge being (R. 5-6, 188-189) that he had carried on deposit at Johnstown, Pennsylvania, in a bank of which he was treasurer, an aggregate amount in excess of the limit allowed by the by-laws and excessive in proportion to the assets of the depository bank.

This bank came into financial difficulties. Upon an examination by the banking department of the State of Pennsylvania, the officers of the bank were notified on a Friday or Saturday that unless indicated steps were taken to correct its condition it would not be permitted to open on the following Monday (R. 53-54). The officers of various banks in the city were called into conference with a view to averting failure of the depository. Finally, as an inducement to a trust company to take over and conduct the business of the depository bank, The Greek Catholic Union, obligee of the bond in suit, agreed in writing (R. 179) to allow two hundred thousand ($200,000.00) dollars to remain on deposit with the trust company for a period of four years without interest unless within that period there

was realized from the assets of the depository an amount sufficient to pay all its depository liability. This agreement was made without knowledge or consent of the surety (R. 94) and following it the business of the depository was transferred to and continued by the trust company without interruption (R. 181-184) and without the payment of interest to the fraternal society (R. 84).

Claim was made on the surety upon the alleged loss of the amount of interest on this deposit of $200,000.00 figured at 5.2 per centum (R. 109), to-wit, for the sum of $41,600.00 with interest thereon from date of claim, and payment being refused by the surety, suit on the bond was brought in the Court of Common Pleas of Allegheny County, Pennsylvania, and removed to the United States District Court for the Western District of Pennsylvania (R. 1).

Judgment on the pleadings was entered in favor of the American Surety Company of New York, the surety, by the District Court (R. 1) in accordance with practice under the law of Pennsylvania. This was reversed by the Circuit Court of Appeals (R. 2) in an opinion by Buffington, J., in which Davis, J., concurred, Woolley, J., filing a dissenting opinion, 25 Fed. (2d) 31. The case being remanded for further proceedings, on the first trial the jury disagreed (R. 2), on second trial a verdict was rendered in favor of the plaintiff for forty-six thousand eight hundred ($46,800.00) dollars (R. 2), from the judgment on which, entered against both defendants, an appeal was taken.

On argument, the Circuit Court of Appeals affirmed the judgment of the District Court (R. 208). Petitioner now seeks a review of that affirmance as to the surety.

SPECIFICATION OF ASSIGNED ERRORS TO BE URGED.

1. The Circuit Court of Appeals erred in refusing to find and hold that under all the evidence the verdict should have been for the surety defendant, being the petitioner herein.

2. The Circuit Court of Appeals erred in refusing to find and hold that the material variance of the risk insured by appellant, whereby a new hazard not covered by the bond was sought to be imposed upon appellant and it was deprived of opportunity both for subrogation and for obtaining proof that the variance was prejudicial, constituted a full defense to the claim against the surety.

That is to say:

3. The Circuit Court of Appeals erred in refusing to sustain appellant's 3rd (R. 201), 5th (R. 202) and 8th (R. 203) assignments of error, which are as follows:

> THIRD. The Court erred in its answer to plaintiff's eighth point, which point and the answer thereto are as follows:
>
> 8. If the jury believe from the evidence that the American Surety Company was liable to the Greek Catholic Union, under its surety contract for the loss suffered by the default of its Treasurer, the agreement entered into between the Greek Catholic Union and the United States Trust Company of Johnstown, Pennsylvania, did not relieve or release the American Surety Company from such liability, unless the jury find that the latter agreement created a material variation, or was a substantial change of said surety contract which change made the Surety Company's risk of loss greater than it would have been if said agreement had not been made.

By the Court:

That is Affirmed.

FIFTH. The Court erred in its answer to defendant's first point, which point and the answer thereto are as follows:

1. That under all the evidence the verdict should be for the defendant, American Surety Company of New York.

By the Court:

That is refused.

EIGHTH. The Court erred in its answer to defendant's fourth point, which point and the answer thereto are as follows:

4. The agreement between the plaintiff Union and the United States Trust Company of Johnstown having effected material variance in defendant's contract of suretyship and having permitted the affairs of Peoples State Bank to be liquidated and its assets collected by said Trust Company instead of a Receiver to be appointed by the Banking Department of the State of Pennsylvania, removed from defendant Surety Company all possibility of participation in any salvage therefrom, and of proving said variance to have been prejudicial and said defendant is thereby relieved of the burden of showing that said variance was prejudicial to it.

By the Court:

That is refused.

ARGUMENT.

SUMMARY.

Introductory Statement.

A. Variance in contract of suretyship, introduced by obligee without consent of obligor, releases the latter.

(1) General statement and Reference to Authority.

(2) Error herein originally arose upon improper deductions of fact from pleadings, on appeal from judgment on statutory demurrer.

(3) It was perpetuated through a jury trial and subsequent appeal.

(4) It was impossible for surety to prove or jury to find that the variance was not prejudicial. "It is difficult to prove the consequences of a thing that never happened."

(5) The only testimony upon the question of salvage though favorable to surety is insufficient to determine extent of its prejudice.

B. The loss sustained by plaintiff was not within the scope of the bond sued upon.

(1) The bond covered honesty and fidelity of officer and failure of depository. The loss alleged resulted from a contract of the Union, the insured, with an outside party and independent of the surety contract.

C. The issue vitally affects commercial suretyship, a business of increasing importance and extent touching intimately the life of the people, its cost based upon experience over a period of years with hazards the extent of which has been determined according to legal principles whose application during such period

has been settled. The ruling of the lower Court if affirmed would add an uncompensated burden to outstanding insurance, a hazard incapable of anticipation and a risk incommensurable in ascertaining the cost of future coverage.

Introductory Statement.

There is practically no issue of fact in this case and the questions of law may be reduced to a very narrow compass. Shorn of all unnecessary verbiage, they may be stated as follows:

Whether in the circumstances the action of The Greek Catholic Union in entering into an agreement, Exhibit "F" (R. 179), released the surety on its treasurer's bond, (a) by introducing a material variance of the contract of suretyship without consent of the surety as a result of which the surety is deprived of its rights to subrogation and of the possibility of proving the variance prejudicial, (b) by substituting a risk not within the scope of the bond.

Point A-(1).

From the opinion of Mr. Justice Brown in *Guaranty Co. v. Pressed Brick Co.*, 191 U. S. 416. we take the general statement of the law applying to variance in surety contracts as follows: (opinion p. 423)

> "It is conceded that, by the general law of suretyship, any change whatever in the contract for the performance of which the guarantor is liable, made without his consent, such, for instance, as an extension of time for payment, if made upon sufficient consideration, discharges the guarantor from liability."

Upon the law as thus stated the surety defendant based its defense in the Trial Court and Court of Appeals.

The Greek Catholic Union, plaintiff below, contended that the law as stated did not apply to a contract of suretyship entered into by a commercial surety, unless it were shown that the variance was not only material but prejudicial as well to the interest of the surety.

In an exhaustive search, counsel for the petitioner herein has been unable to discover any case in which the questions here presented have been adjudicated. Perhaps this is due to the comparatively recent entry of commercial suretyship into its present spheres and the rapid extension of the latter. No case has been found where a surety has been held without its consent to proof that it was prejudiced by the very action of the obligee which deprived it of all possibility of such proof, or that after the obligee had seen fit, without the surety's knowledge or consent, to enter into a composition in settlement of an anticipated loss, it could substitute for the original hazard of the bond a fixed loss so incurred and recover such loss from the surety.

The opinion in the case of *Guaranty Co. v. Pressed Brick Co., supra,* sets forth, we believe, the principles of the law applying to the case at bar and the report of that case is referred to as affording a sufficient compendium of the law required for a decision herein.

The action in the case just cited arose upon a bond executed under an Act of Congress to secure performance by a contractor of a contract to construct a federal building. It was conditioned, not only upon the faithful performance of the work, but to promptly make

payment for labor and material supplied thereon. Suit on the bond by one of the material-men was defended by the surety on the ground that plaintiff had extended time for payment of balance due and in accordance therewith had accepted two promissory notes aggregating the amount of said balance.

Counsel for the Brick Company, use-plaintiff, argued that the rule of *strictissimi juris* in interpretation and construction of suretyship obligations did not apply to case of a compensated surety.

The Court, after referring to this and without adopting the proposition of counsel, enters into a discussion of the character of the covenant upon which the action was brought and referring to ordinary guaranty and the knowledge available to the surety of the parties, the terms of their undertaking, character and responsibility, amount for which it may be liable and the like, remarks: (opinion p. 425)

> "In such cases he (the surety) contracts in reliance upon the exact terms of his principal undertaking, and has a right to suppose that no change will be made without his consent; and the courts have gone so far as to hold that any change will exonerate him though it really redound to his benefit."

After discussing the character of the extension of credit given, the opinion proceeds: (p. 426)

> "The facts of this case do not call for an expression of opinion as to whether, if an unusual credit were given and in the meantime the principal obligor had become insolvent or the surety were otherwise damnified by the delay, it might not be exonerated."

By inference it would seem the Court would have affirmed the inverse of this proposition and would have exonerated the surety if an unusual credit had been given or the surety were otherwise damnified.

Point A-(2).

The error complained of in the case at bar had its inception in deductions made by the majority of the Circuit Court of Appeals when the case was before it upon the pleadings alone. Thus from the one averment on the subject found only in paragraph 15 of plaintiff's statement of claim (R. 8) that

> "the Executive Officers and Board of Trustees of the plaintiff having been called together especially for the occasion, and having consulted the agents of defendant, and fully informed them of said facts (that is of the failing circumstances of the depository) agreed to accept the terms of the proposition from the U. S. Trust Co.;"

the Circuit Court of Appeals makes some rather surprising enlargements.

The statement in the majority opinion of the Court, 25 Fed. (2d) 31 (opinion p. 32, col. 2):

> "In pursuance of the requirement of the bond that notice of such loss be delivered to the surety at its Home Office in the City of New York within ten days after such discovery, the Surety Company was at once informed by long distance phone of the situation."

And again (p. 33, col. 1):

> "Confronted on a Saturday by this critical condition which required prompt action before the following Monday morning, the society officers and

> their counsel met that evening at Johnstown and by long distance phone at once told the agent of the Surety Company at Pittsburgh and an executive officer at New York of the situation."

are statements of facts and without foundation in the pleadings before the Court. The effect of these assumptions on the mind of the writer of that opinion are apparent from the concluding words of the last paragraph but one, where the court declares that "the insurer with notice of the loss left the insured to meet the situation alone." There was no loss at the time of the meetings at Johnstown referred to in plaintiff's statement of claim. There was not, nor could have been, any "notice of the loss" as required by the bond. There is no averment in the statement of claim upon which to base the statement that any notice of any contemplated action whatsoever upon the part of the obligee was communicated to the surety. There is no averment in the statement of claim that any communication whatever was had with any executive officer of the surety. Not that this was material in the circumstances of time and matter, but it is of importance as going to the accuracy of the statements of fact on which the Court's decision was based. These statements of the Court probably originated in inferences from remarks of counsel at the oral argument.

This error thus put into writing was perpetuated at the trial of the cause before the jury, and the law as stated by the Circuit Court of Appeals upon assumptions purporting to be drawn from the pleadings was applied by the Trial Court to a very different set of facts brought out by the testimony.

The total evidence on this subject of notice is to be found in stipulation of counsel (R. 94) as to what would

be the testimony of Mr. Davis, of counsel for the obligee if called upon the stand, substantially corroborated by petitioner's witness Benham (R. 138). This stipulation was admitted as a courtesy to Mr. Davis to avoid his going on the stand and thereby, under the rules of the Trial Court, being precluded from taking part in the argument of the case to the jury. Nowhere in the stipulation does it appear that any proposal on the part of any other bank to underwrite the deposits of the unfortunate depository had been made or suggestion of any agreement such as was entered into the following morning by the Union. Although the obligee, the Union, had knowledge of the general situation as early as Friday afternoon (R. 99, 102), no attempt was made to communicate with the surety until two o'clock Sunday morning following, when the Manager of the surety's Pittsburgh agency was called on the telephone and later about ten o'clock Sunday morning, when the Manager of the Claim Department of the Home Office of the Company was called at his residence near New York City. Neither of these men were executive officers of the Company. Mr. Benham, Manager at Pittsburgh agency, held an appointment as Resident Vice President, a title conferred upon him and a number of clerks in his office (R. 137) and other agencies throughout the country in order to enable them to execute certain surety bonds when particularly authorized by the Home Office at New York City and it is admitted (R. 95) that his status was known to Mr. Davis.

Point A-(3).

It is interesting to observe how the error of fact above referred to as having crept into the first opinion of the Circuit Court of Appeals was perpetuated in the second. In a very brief opinion and apparently without any reference to the testimony before it, the Circuit Court of Appeals when the case was last before it said, 51 Fed. (2d) 1050 (opinion p. 1050 col. 2.)

> "This case was heretofore before this Court. Reference to 25 Fed. Rep. (2d) 31 will explain its facts and obviate present repetition."
>
> * * * * * * *
>
> "The former opinion fully discussed the alleged facts and set forth the legal principles to be applied in the case on retrial."

Upon that assumption and upon the bald statement (opinion p. 1051 col. 1) that whether there was a material variance or a substantial change in the surety contract, making the Surety Company's risk of loss greater than if the agreement had not been made,

> "On these questions the jury found for the Union,"

the Circuit Court, without more, affirms the judgment of the Trial Court. Apparently the testimony was never considered. Certainly even a casual reading would have differentiated the facts from those statements of the Court in "the former opinion."

Point A-(4).

How could the jury have found that the agreement entered into by the obligee did not work a material change prejudicial to the surety when the agreement by its very terms deprived the parties of all possibility of ever producing evidence on the subject? As was said by His Honor, Judge Woolley, in his dissenting opinion in this case (25 Fed. (2d) 31), last paragraph but one (p. 34, col. 2),

> "Whether on an issue of prejudice it would appear that the defendant would actually have lost more if resort had first been made to its bond than is now demanded of it and just how much more is a matter that will, from the very nature of the case, always remain in the realm of conjecture. It is difficult to prove the consequences of a thing that never happened."

In view of this situation the argument of the plaintiff below that the surety must show a material variance by which it was prejudiced and the authorities by it cited in support of that proposition would seem to be entirely beside the point and of no avail. There is no case we have been able to find which goes so far as to hold that even a commercial surety is not released by a change in its contract whereby it is deprived of its right of subrogation. That right, in the case at bar, was distinctly conferred by provision 5 of the bond (R. 37). And is it not a singular proposition to assert that an obligee may, by its own act and without consent of the surety, deprive it of all opportunity of proving a variance prejudicial and at the same time demand such proof as a prerequisite to the surety's relief?

Point A-(5).

The only testimony at all on the subject of salvage is that of the plaintiff's witnesses, Cherry and Jendricks, both officers of the United States Trust Company of Johnstown, which had underwritten the depository obligations of the Peoples State Bank, former depository of the plaintiff Union. Cherry testified (R. 65) that he had been cashier of the Peoples State Bank and on pages 69 and 70, that since the closing of that Bank he had been employed by the underwriting Trust Company and had had charge of the collection of the assets of the former depository.

It will be observed that counsel began his interrogation as to these assets (R. 69):

"Q. Mr. Cherry, you are still interested, I believe, in the collection of these notes and securities that were listed in your report?

A. I am."

This was followed by the questions as to amounts remaining "uncollected" at certain times. In the last question, in an effort to ascertain the amount uncollected at the time of the trial, when the question was repeated the word "uncollectible" was substituted. The answer "$98,000.00, unconverted," was not categorical and in view of Cherry's statement as above that he was still interested in collection of the assets, it cannot be assumed that he intended to convey his opinion that the amount of $98,000.00 was uncollectible, but simply that it was as yet unconverted.

Mr. Jendricks, Treasurer of the United States Trust Company, in his testmony (R. 74) stated:

"Q. And there is still a considerable amount outstanding?

A. Yes, sir, uncollectible."

He was not interrogated as to amounts. But he was Cherry's superior officer and heard the testimony of the latter that he was still interested in the collection of assets of the Peoples State Bank. Is it not a reasonable inference that he would not have assigned Cherry to a futile task and that the expectation of realization from the "$98,000.00 unconverted" must have justified Cherry's labor?

And having in mind the total assets of the depository when it was absorbed on April 7, 1924, being Cherry's "$320,000.00 uncollected" securities plus the cash, real estate and equipment, Exhibit "E" (R. 177), if there is any fair inference to be made, it would seem to indicate that efficient administration may yet result in a profit to the bank that underwrote the deposits.

Point B.

Reference again to the opinion in *Guaranty Co. v. Pressed Brick Co., supra,* and to the last sentence of the last paragraph but one indicates the caution with which this Honorable Court has approached in the past any question of disturbing well settled rules of law.

After remarking, that an insurance contract undertaken for profit should be interpreted liberally in favor of the insured, the Court adds:

> "Of course this rule would not extend to cases of fraud or unfair dealing on the part of (the insured) * * * or to cases not within the scope of the undertaking."

Point B-(1).

The bond upon which this suit is based appears as Exhibit "C" (R. 35). It is a standard form known as "F 15 Fraternal Continuous Schedule Subordinate Officers" (R. 39) and by its terms the surety binds itself to pay to the obligee such pecuniary loss as it shall have sustained of money, funds, securities or other personal property.

(a) through fraud, dishonesty, etc., on the part of the officer or employee bonded,
(b) through failure of such officer faithfully to perform his duties as prescribed by the constitution and by-laws of the order,
(c) through failure of the officer or employee to keep intact and account for funds of the order,
(d) through failure of a depository.

In paragraph 5 of the provisions, it is agreed that in event that the loss under any suretyship exceeds the amount of such suretyship, the order and the surety shall share with each other pro rata in any net recovery, except from other suretyship, in a proportion that the amount of payment under the suretyship bears to the total shortage.

Under the terms of the bond, as in the case of an ordinary guaranty bond discussed in *Guaranty Co. v. Pressed Brick Co., supra,* the guarantor understood perfectly the nature and extent of its own obligation, its liability upon breach of the bond by the officer or upon failure of the depository to pay the amount of loss so occasioned and its right thereupon to be subrogated to the rights of the obligee to claim and receive any property, securities, payments or dividends upon which the obligee would have had right to make a claim.

There was no claim of violation of paragraph (a) of the bond. The Union claimed its Treasurer had breached his bond by depositing funds in excess of limitations under its by-laws in a bank that was not a safe depository for such amounts and that this breach of paragraph (b) constituted also a breach of paragraph (c) of the bond.

No claim was made under paragraph (d). The depository liability on the bond never accrued for the reason that the depository did not fail. It was not allowed to fail. Had the depository been closed by State Banking officers the surety would have paid its depository liability and would have been subrogated to the right of the obligee to participation in distribution of the assets of the depository and who could now say that it would not have been reimbursed in full for its expenditures?

It seems preposterous to assert that the bond in question contemplated coverage of a hazard so uncertain and highly speculative as a fixed loss which the obligee might bring upon itself through its voluntary effort, by some substituted arrangement, to minimize an anticipated loss covered by its surety bond. That no experience over any number of years could afford a basis for the collection of a premium to cover the hazard of loss which an obligee might thus be persuaded to assume without the consent of the surety, seems to find a complete answer in a mere statement of the proposition. Is there more required to justify the suggestion that such a hazard is not within the scope of the bond sued upon?

Point C.

The importance of these questions to the business of fidelity and similar suretyship is apparent when one considers that the rates charged by way of premium must be calculated and laid in an amount sufficient to cover the risk and compensate the surety for its service.

The requirements of modern business for this class of suretyship have exceeded for many years the possibilities of individual suretyship. To meet the demand of business, law and the social organization in general for a form of insurance providing safety at a reasonable cost the commercial surety companies have come into being within comparatively recent years and their business has increased so rapidly that there are today outstanding millions of dollars of fidelity and depository insurance covering a vast portion of the Nation's business.

The settlement of the law relating to suretyship and the uniformity of decision is, therefore, of large moment. The insurance outstanding today is based upon the law as it has been heretofore declared and calculations of the risks and hazards covered by the various forms of bonds have been made upon the basis of experience of loss under the legal obligations as heretofore applied to said suretyship. Skilled actuaries have calculated the rates over an experience of many years.

That the relaxation hertofore accorded the rule of *strictissimi juris* in interpreting and construing the contracts of compensated sureties is a necessary and proper evolution of the law of suretyship is hardly subject to question in view of the uniformity of the decisions to that effect. ***But the ruling in the present case carries this relaxation beyond a danger point in that it adds an***

additional hazard, uncontemplated when the insurance was written; imposes upon the surety a burden against which it is not secured and for the assumption of which it is not compensated in its outstanding contracts; and adds liability for a class of speculative risks the cost of whose coverage is probably not susceptible of calculation.

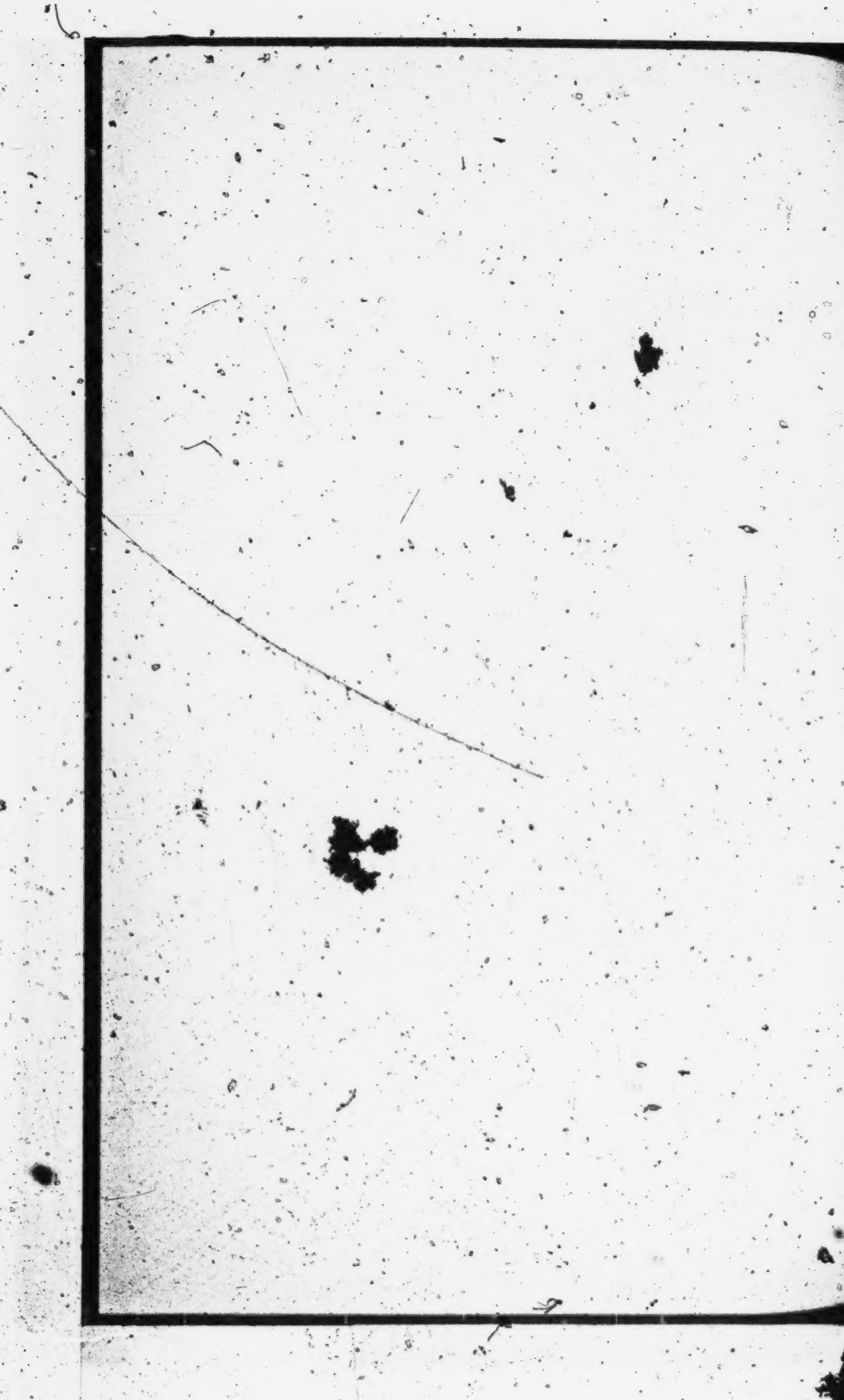
That the affirmance of the principle laid down by the Court below would be deplorable and perhaps disastrous to the surety business through the disturbance of rate schedules and increased cost of bonds for such suretyship is readily apparent. But even this is of minor importance, if the law of the land shall be held to permit the beneficiary of an insurance contract, such as that involved in this case, to change the contract at will without notice to or consent of the insurer and upon a suit for such loss as he may bring upon himself to say:

> "It looked to me as though both of us were going to lose so I went ahead, without notice to you or your consent, and settled the matter by taking a definite loss which you must pay unless you can prove to me that you were prejudiced by my act. Why should you object that I have put it out of the realm of possibility for you to show that you were prejudiced and deprived of any opportunity for reimbursement by way of subrogation, which would otherwise have been yours?"

Respectfully submitted,

JAMES M. MAGEE,
Counsel for Petitioner.

EDMUND W. ARTHUR,
Of Counsel.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931

NO. 401

AMERICAN SURETY COMPANY OF NEW YORK,
Petitioner,

v.

THE GREEK CATHOLIC UNION.

BRIEF OF RESPONDENT TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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BRIEF FOR RESPONDENT.

In opposition to this Petition for review of the judgment of the Circuit Court of Appeals in this case, we, on behalf of the Greek Catholic Union, take the position, that this case is not one which requires, or justifies review by this Honorable Court, and present reasons in support of this, our position, as follows:

There is no Federal question involved in this case. The whole question here is one of ordinary commercial law. There is no conflict of decisions of the Circuit Court of Appeals involved. There is no question of local

law upon which this decision is in conflict with the applicable local decisions; on the contrary the decision and the reasons for it follow and are in harmony with the decisions on the same and similar questions of the Courts of the State of Pennsylvania, where the case arose and was tried, as well as in harmony with decisions of this Court and of other Federal Courts in like cases; and the procedure followed by the Courts below in the case was in full conformity with the usual and accepted course of proceedings in such cases.

The only point at which any attack can be made upon this judgment, in compliance with the provisions of Rule 38, of this Court, is to attempt to classify this case, as one in which an important question of general law has been decided by the Circuit Court of Appeals, "in a way probably untenable and in conflict with the weight of authority."

We contend that such is not the case. While an important question of general law has been here decided, the decision is not untenable nor contrary to the weight of authority, but quite the reverse.

The petitioner, defendant below, is complaining because it has been held liable on its bond given to secure the respondent, from loss by reason of the failure of George Kondor, also a defendant below, to fulfill his duties as Treasurer of the Greek Catholic Union Society, —the respondent, the plaintiff below.

The said George Kondor was guilty of default in his duties and obligations as such treasurer, and had breached the bond in this suit. The petitioner's contention on the trial was that it was released from its obligations as surety on said bond, by the actions of the respondent *after the breach of the bond, by said principal, George Kondor, had occurred.*

What the respondent did in this matter was this:—After it was ascertained that said Kondor was in default, in the safe keeping of the funds of the respondent, because he kept on deposit a large part of respondent's funds, in an insolvent bank of which he, Kondor, was president, and a director, viz. The Peoples Bank of Johnstown, Pa.,—as well as in default in his conduct as such treasurer, in some other points,—whereby there was certainty of great loss to the respondent,—much exceeding the amount of $100,000.00 for which it was secured by said bond, the responsible officers of the respondent, made an agreement with another bank, which was known to be sound and solvent, to wit, The United States Trust Company of Johnstown, Pa., to leave in the latter bank on deposit $200,000.00 without interest for four years, if said Trust Company would take over said Peoples Bank and pay off the depositors thereof, including respondent. This arrangement and agreement was made with the advice and co-operation of the Banking Commissioner of the State of Pennsylvania, who had taken possession and control of said Peoples Bank, and threatened that if such an arrangement was not made, the said Peoples Bank would be immediately closed, and placed in process of forced liquidation.

This situation developed on a Saturday, and the Peoples Bank would not be permitted by said Commissioner of Banking to open on the morning of the following Monday, unless some arrangement satisfactory to him, could be made on Sunday to secure the depositors of said Bank. The facts of this situation are shown on the Record of the pleadings at p. 12, and of the evidence at pp. 90-91, 120-121.

There was here created an emergency. What action was to be taken had to be taken between Saturday afternoon and Monday morning. It is not true that no effort

was made to obtain co-operation and consent of the Surety Company, in the premises. The evidence shows that on Saturday evening one of the Surety's Company officers in Pittsburgh, a Vice-President, was communicated with and at his direction on the following Sunday morning an official of the Company in New York, who was the head of the claim department, was communicated with by telephone. Both these officials of the Company declared that nothing could be done because the day was Sunday and there was no time for their action (Record pp. 140-141). The respondent's officers were therefore left to take care of the situation themselves, and they did so with the purpose in mind to minimize the loss as much as possible, both for the respondent and for the Surety Company. The agreement with the United States Trust Company of Johnstown assured the respondent of the eventual recovery of $200,000.00 of its deposit, then in jeopardy, in said Peoples Bank of Johnstown, with the loss of four years interest on said sum, whereby their ultimate loss would be much less than all the estimates made by the Company's officers and by the State Banking Commissioner at that time showed to be practically certain; and the loss to the Surety Company was much less than it would have been if it had been obliged to pay the full amount of its surety bond, to wit, $100,000.00. All the judgment in this case requires of the Surety Company is that it should pay the lost interest on the impounded deposit of $200,000.00, which is calculated at $41,600.00 with interest. The respondent ultimately received its $200,000.00 deposit, but totally lost all said interest. The facts in regard to this appear on p. 124 of the Record.

It thus appears that the agreement which was made with the Trust Company would greatly minimize the loss which the Surety Company would have had to pay if that agreement had not been made. So the agreement

was indeed one for the benefit of the Surety Company, even more than for the benefit of the Greek Catholic Union.

As stated there was an emergency here which required immediate action to prevent the Peoples Bank being closed and put in liquidation by the State Banking Commissioner on the following Monday morning. We contend that the respondent was fully justified in its action without the consent of the Surety for reasons stated thus: The rule of *strictissimi juris* which the petitioner invokes for its protection does not apply here. That rule applies in the case of ordinary sureties, but not in the case of a surety bond like this made by a corporation engaged in that very business. Such a corporation engaged in the business of insuring for pay the fidelity of employees, is an insurance company, and its liability is to be judged and determined by rules and principles which apply to insurance contracts, and not by such rules as apply to ordinary contracts of suretyship. This principle is thoroughly established by decisions of both the Federal Courts and the Courts of the State of Pennsylvania.

American Surety Company v. Pauly, 170 U. S. 133;
U. S. F. & G. Company v. Golden Brick Co., 191 U. S. 416;
Young v. American Bonding Co., 228 Pa. 373;
Philadelphia v. Fidelity & D. Co., 231 Pa. 208;
Brown v. Title Guaranty & Surety Co., 232 Pa. 337;
Philadelphia v. Ray, 266 Pa. 345;
M. E. Church of Franklin v. Equitable Surety Co., 269 Pa. 411;
Sokoloff v. Fidelity & Cas. Co. of N. Y., 288 Pa. 211;

Conroy v. Commercial Gas Co., 292 Pa. 219.

Also Note:

Hormel v. American Bonding Co., 33 L. R. A. (N. S.) 513;

1 Cooley's Briefs on Insurance, p. 9.

The situation in which the respondent was placed was analogous to a case of insured goods in a burning building. By insurance law the owner of such goods has the right to remove them from the building, without consent of the insurance company, and does not forfeit his insurance by reason of such action, though the goods were stolen or damaged by the elements in the place to which they were removed. So also in case of a marine disaster the master may jettison cargo, without forfeiting the insurance thereon even though it be proved that afterward the ship got safe to port, and the cargo would have been saved.

Insurance Co. v. Agnew, 34 Pa. 96;

Insurance Co. v. Cuff, 35 L. R. A. (N. S.) 892;

Insurance Co. v. Patterson Drug Co., L. R. A. 1917 D p. 1091;

Cooley's Briefs on Insurance, 3065.

The petitioner lays the chief stress of its contention in the defense it is making on the point that the agreement with the U. S. Trust Company, as it alleges, varies the obligation of the petitioner under said surety bond, and substitutes a new risk to its prejudice. This is not true. The agreement with the Trust Company was made after the breach of the Surety Bond had occurred, and the liability of the petitioner to make good any loss sustained by the respondent had been fixed. The only thing then left to do was to ascertain the amount of the respondent's loss; and it was to that point that the agreement with the Trust Company was directed. The petitioner was bound to the amount of $100,000.00, but all

the evidence shows (Record pp. 82-121) that if the Peoples Bank closed and went into liquidation, the respondent's loss would greatly exceed that amount. Under the agreement, the amount of loss would be confined to loss of interest on the impounded deposit, and that has been calculated to be $41,600.00, and that is all the petitioner as insurer on its bond is held liable for; a great saving to it. Of course, as petitioner has resisted payment of this obligation since April, 1928, interest has accrued upon this sum which is that much additional loss to respondent, and is to be so accounted for by the petitioner.

The only answer which the petitioner makes to this point of argument is that the contract made with the U. S. Trust Company varied the terms of the original contract upon which it had given its bond, because it prevented the Surety Company from having any opportunity to take over the assets of the defaulting bank and liquidate said assets so that it might not lose as much as it did under this judgment.

This argument is fallacious. The only alternative to the making of said agreement, as was made, was that the Pennsylvania State Banking Commissioner would take over the defaulting bank, close it and place it in process of forced liquidation in the usual method in such cases, that is, by a receiver appointed by the Banking Commissioner. The petitioner would have had no chance whatever to get the assets of the defaulting bank into its control for liquidation, unless, perhaps, it had been willing to give security satisfactory to the Banking Commissioner that all the obligations of the defaulting bank to its depositors, and also to its stockholders, would be paid in full. The Banking Commissioner could not have permitted a third party to take the assets of the defaulting bank out of his control on any other terms, and there is no likelihood that the petitioner

would have made any such terms, consequently, if the agreement had not been made, the liquidation of the assets of the Peoples State Bank would have been conducted in the ordinary form of a receiver under the State Banking Commissioner, and the experience of such liquidations has always been that the loss to the depositors and others would be greater than where the liquidation was conducted, as it was, in the present case, by a friendly bank in the immediate neighborhood and well acquainted with the whole situation.

It is true that if the insured agrees to a material variance of the terms of the contract or relationship between him and the party whose fidelity is insured, to the prejudice of the insurer, the latter may be thereby relieved of its obligation. But such relief of the insurer is very narrowly limited to cases where there is truly such a variance, and it is actually material and is or will be actually prejudicial to the insurer's rights and interests. And the burden is on the insurer, in such a defense, to show that it has been or will be injured as the result of the alleged variance.

In *Philadelphia v. Ray,* 266 Pa. 345, it is said that in such a defense the insurer "must prove the change was material and prejudicial"; and those words are quoted with approval by the court in *Sokoloff v. Fidelity & Cas. Co.,* 288 Pa. 211, 215. The same rule was applied in *Conroy v. Commercial Cas. Ins. Co.,* 292 Pa. 219, 228. "In contracts of this kind, to escape liability, *the insurer must show* that the breach is something more than a technical departure from the letter of the bond,—that it is a departure that *results in substantial prejudice* and injury to its position". *Parmelee v. Aetna Life Ins. Co.,* 166 Fed. 741. It is the *insurer who must bear the burden* of showing these facts of material departure

from the original contract or relationship, and *actual loss or injury* to it as the result thereof.

The burden was on the petitioner to show that it had actually sustained prejudice by the making and carrying out of said agreement with the Trust Company, but it showed no such loss or prejudice and it made no effort to do so. It offered no testimony on that point, and the only testimony was that from the respondent's witnesses on the trial of the case, by which it is shown after five years that the liquidation as conducted really saved the Surety Company a large sum of money, and that it would have had to pay much more than the amount for which this judgment calls; unless it had been much more successful in liquidation than the Trust Company was, of which there is no evidence and no probability. As above stated there was no change in the contract between either the respondent and the petitioner, or between the respondent and George Kondor, the principal on the bond, and the burden is heavy upon the petitioner to show that the agreement so made and carried out caused it material damage or prejudice. In all fairness and equity, the petitioner should not be permitted to escape its liability under this bond to the amount charged against it in this suit, whereby it is manifest that it has been saved the difference between $100,000.00 and $41,600.00 under its paid fidelity and insurance bond, by which it obliged itself to indemnify the respondent against all loss or damage resulting from the acts of said Treasurer, George Kondor.

The decision in this case does not "unsettle the law of suretyship, nor does it introduce a radical relaxation of a well established rule". Neither does it "add an additional burden uncontemplated and uncompensated to millions of outstanding fidelity insurance written upon the basis of pre-existing law". Neither does it

"add confusion to the law of suretyship, by permitting, without the consent of the surety, the addition of new speculative risks which cannot be specified in advance or anticipated, resulting in general unsettlement of the schedule or rates of all commercial companies, to the discouragement of a business, the sphere of which is rapidly increasing in importance".

The general statements contained in petitioner's brief of argument are not based on all the facts of the case. The conclusions expressed are vague, indefinite and overdrawn. In fact, the law as laid down by the court in this case is in exact conformity with the existing law, and the rulings of the court can all be construed in the exact reverse of the terrifying picture attempted to be drawn by the pleader for the petitioner.

It is respectfully submitted that the ingenious and astute argument of the petitioner is biased, does not set forth all the issues involved, picks out only that which by the most strained effort can be argued in its favor and generally is a desperate attempt to escape liability for a just and honest obligation which it had been paid to assume.

The amount of the loss being exactly established and the liability therefor being fully proven, the verdict of the jury was correct under the law and the facts, the judgment was correctly affirmed by the Circuit Court of Appeals, there is no occasion for the review of its judgment in this Honorable Court, and leave to appeal should be refused.

Respectfully submitted,

THOMAS STEPHEN BROWN,
RALPH C. DAVIS,
Attorneys for Appellee.

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Supreme Court of the United States

OCTOBER TERM, 1931.

NO. 401.

AMERICAN SURETY COMPANY OF NEW YORK,
Petitioner,

v.

THE GREEK CATHOLIC UNION.

BRIEF OF DEFENDANT IN ERROR ON QUESTIONS RAISED ON CERTIORARI.

THOMAS STEPHEN BROWN,
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The burden of proof is on the Surety Company to show that the affect of the Agreement was to increase its loss, if it was to be released from its obligation, but it produced no such evidence.

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v.

THE GREEK CATHOLIC UNION.

REFERENCE TO OPINIONS OF THE CIRCUIT COURT OF APPEALS IN THIS CASE.

This case has been before the Circuit Court of Appeals twice, and decisions have been made therein in favor of the plaintiff below, which are reported for the first Appeal in 25 Federal Reports 2nd p. 31; and the second Appeal in 51 Federal Reports 2nd p. 1050.

BRIEF FOR DEFENDANT IN ERROR.

I.

Summary of Argument.

The dispute in this suit is over the obligation, of the American Surety Company, the plaintiff in error, hereinafter called the Surety Company, to fulfill its promise to the Greek Catholic Union, the defendant in error, hereinafter called the Union, to indemnify the latter from any pecuniary loss, by reason of the defaults of George Kondor, the Treasurer of the Union.

The facts proven in the case show that said Treasurer did default, in several points, and that the Union sustained a pecuniary loss to the amount of the judgment, viz, $41,600.00, which was the interest on

$200,000.00 deposit for ~~five~~ FOUR years as required by the Agreement discussed herein, with interest amounting at the date of the verdict May 8, 1930, to $46,800.00. The Surety Company was bondsman for said Treasurer to the amount of $100,000.00, under its Fidelity Insurance Bond.

There is now no dispute that said Treasurer did actually default in his office. The testimony shows that he could not and did not account to his principal for the sums of money intrusted to him. There were other points in which said Treasurer was in default, which appear in the testimony and may be mentioned hereafter. Counsel for the Surety Company admit in their Brief of Argument, that "there is practically no dispute over the facts in this case."

There also is no doubt or dispute about the fact of the pecuniary loss sustained by the Union as the result of said Treasurer's default. The amount of such loss proven was $41,600.00, upon which interest from April 5, 1928, has accrued, and for the recovery thereof the Union brought this suit and recovered verdict and judgment therefor in the District Court, which judgment was affirmed by the Circuit Court of Appeals.

The contract of the Surety Company, on which its liability is based, was what is known as a Fidelity Bond, by which the faithfulness of said Treasurer in his office was insured to the Union. This Bond is exhibited in the evidence as Exhibit "C", and is discussed later herein.

These basal facts upon which the claim of the Surety Company's liability is founded are not now disputed.

The chief, and only real contention made by the Surety Company, has been over the effect of the con-

tract which the Union made with the United States Trust Company, for the purpose of minimizing the loss to be sustained as the result of the Treasurer's default, which action, the Surety Company contends, released it from its obligation under said Bond. The position of the Union on this point has been and is, that that action had no effect whatever to discharge the liability of the Surety Company under the circumstances, and in this position the Circuit Court of Appeals sustained the Union in both the appeals which were taken in the case.

Our argument is that that agreement was made in an emergency, at a crisis, where if it had not been made the loss to the Union would have been about $140,000.00, and the Surety Company would have had to pay its full bond of $100,000.00, but the result of said agreement was to bring the loss down to $41,600.00, which the Union had to lose by the terms of said agreement, and which the Surety Company ought to pay.

The Surety Company's bond is an Insurance Policy, to indemnify the Union against all loss by reason of defaults of the treasurer, George Kondor. Said Surety Company makes a business of writing such insurance contracts for compensation; and it was compensated in this case. Such contracts, and the rights and liabilities of the parties thereto, are governed by the rules and laws of insurance contracts, not by those of ordinary suretyship and guaranty. The case is analagous to salvage of insured goods in a burning building, where if goods are removed in an effort to save them, but nevertheless are lost not by the fire, but by other causes, the insurer is still liable for the loss.

Said agreement did not change or vary the contract between the Surety Company and the Union, to the detriment of the Surety; and the Surety was not

discharged from its obligations under said Bond. The only effect of said agreement upon the Surety was to reduce, very materially, the amount it had to pay. This we had the right to do, and, perhaps, were under obligation to do, so long as our action in so doing did not actually increase the burden of obligation on the Surety. This position has been sustained by the two decisions in the Circuit Court of Appeals in this case.

We proceed now to discuss, on behalf of the Union, these points, in the light of the evidence found in the Record of this case, and the law applicable thereto.

II.

The Surety Bond.

The surety bond upon which this case is founded is shown in the Record at pp. 35-39 as Exhibit "C". It is denominated a "Schedule Bond", and insures the Union against "such pecuniary loss as it shall have sustained" from the defaults of the officers included in the "Schedule", of whom the Treasurer, George Kondor, was one.

> (a) "through Fraud, Dishonesty, Forgery, Theft, Embezzlement, Wrongful Abstraction or Wilful Misapplication on the part of any such officer or employe, directly or through connivance with others,
>
> (b) or through the failure of any such officer or employe faithfully to perform his (or her) duties as prescribed by the Constitution and By-Laws of said Order,
>
> (c) or through the failure of any such officer or employe to keep intact and absolutely to account for all funds of the Order in accordance with said Constitution and by-laws;
>
> (d) or through the failure of any bank or trust company wherein are deposited funds for which any

such officer or employe is responsible to the Order. In case of such loss, the liability of the Surety shall not exceed the amount of the suretyship hereunder for the officer or employe directly charged with responsibility for the funds."

The amount of said bond for said Treasurer was $100,000.00. For this Bond the Surety Company was paid a premium of $500.00 annually. *This so called "Bond" is really an Insurance Policy,* in favor of the Union, insuring the fidelity of the Treasurer in his office; and the Surety Company is to be held to the obligations of an insurer, not merely of a surety.

It is well established law that, in case of a corporation which makes a business of furnishing such bonds as this, for compensation paid to it therefor, the contracts, so made, are in reality contracts of insurance, and the obligations of such bonds so issued are those of insurance policies not those of contracts of guaranty or suretyship to which the strict rules in favor of sureties are to be applied. They are contracts for indemnity, the purpose of which is to reimburse the obligees for loss and damage caused by the contingencies insured against; and so, as in case of insurance policies, the indemnitors are not relieved of obligation by the application of strict rules, but, in cases of questionable construction of the contracts, the doubts are to be resolved in favor of the assured, that he may have the benefit of the indemnity for which he contracted and paid.

The leading case on this point is, probably, *American Surety Company v. Pauly,* 170 U. S. 133, 144, in which Justice Harlan says (p. 144):

"The object of the bond in suit was to indemnify and insure the bank against loss arising from any act of fraud or dishonesty on the part of

> O'Brien in connection with his duties as cashier. * * * That object should not be defeated by any narrow interpretation of its provisions, nor by adopting a construction favorable to the company if there be another construction equally admissible, under the terms of the instrument executed for the protection of the bank."

He further mentions that the bond, as in the case of an insurance policy, was prepared and drawn up by the insurer and therefore is to be construed most strongly *against the insurer* and in *favor of the insured;* which he says is a familiar rule in the law of insurance, and "There is no sound reason why it should not be applied in this case."

Another case, between the same parties, which arose upon the bond of the president of the bank, was heard at the same time, and the same conclusions reached upon this point. It is reported in the same volume—170 U. S., p. 161.

Numerous other decisions of the Federal Courts have held the same doctrine. We cite:

U. S. Fid., etc., Co. v. Golden, etc., Brick Co., 191 U. S. 416;

Sup. Council C. K. A. v. Fid. & Cas. Co., 11 C. C. A. 96;

Tibbets v. Merc. Credit Guar. Co., 19 C. C. A. 281;

Carstairs v. Amer. Bonding Co., 54 C. C A. 85.

We quote from the opinion of Lacombe, J., in the case of *Tibbets v. Merc. Cr. & Guar. Co.*, cited above, which was a so called "credit insurance" contract or policy:

> "The cases cited by the defendant in error holding that a surety is a favorite of the law, and that

claims against him are *strictissimi juris,* have no application. Companies entering into contracts like the one at bar may call themselves 'guarantee' or 'surety' companies, but their business in all essential particulars is that of insurers who, upon careful calculation of the risks of the business, and with such restrictions of their liability as may seem to them sufficient to make it safe, undertake to assure persons against loss, in return for premiums sufficiently high to make such business commercially profitable. Their contracts are, in fact, policies of insurance, and should be treated as such."

In *Cooley's Briefs on Insurance,* Vol. 1, p. 9 *et seq.,* it is said:

"The surety company has voluntarily become what may be called a 'common surety' * * * one of those public agencies to which are given unusual powers. Since they make such regulations as seem necessary for their own protection, the stipulations will be liberally construed against them to prevent a forfeiture of the indemnity for which alone the bond is given. This seems to be the distinction between ordinary suretyship or guaranty and the contracts of these guaranty or surety companies. The ordinary surety is the favorite of the law, and the contract is construed most liberally in his favor. On the other hand, contracts of these guaranty or surety companies are regarded as contracts of common sureties doing business for a valuable consideration, under conditions fixed by themselves, and must therefore be construed most liberally against them." Many cases cited.

The case of *United States Fidelity & Guaranty Co. v. Golden Pressed Brick etc. Co.,* 191 U. S. 416, was a case certified by the Circut Court of Appeals to the Court for

decisions of two questions, one of which involved the effect upon the liability of a bonding company of the act of the insured in such a bond in giving indulgence of time to the principal of the bond, though it was not shown that any loss or damage resulted to the insurer by reason of such act of indulgence. The Bonding Company contended that it was discharged from liability under the rules of suretyship; but this Court decided the question in the negative.

The Surety Company, in its Brief of Argument in this case, cites this decision, and quotes from Justice Brown's opinion a statement about the strict rules in the case of ordinary suretyship against indulgence of the debtor by the assured, without the consent of the Surety, but does not quote the language of the actual decision, which really was that such rules do not apply to the case of a compensated surety. In connection with this citation counsel says, "In an exhaustive search he has been unable to discover any case in which the questions here presented have been adjudicated." We think that he need have only read this decision through to the end to have found the followning significant language in Justice Brown's opinion, which seems to us to decide almost flatly one important question presented in this case.

> "The rule of *strictissimi juris* is a stringent one, and is liable at times to work a practical injustice. It is one which ought not to be extended to contracts not within the reason of the rule, particularly when the bond is underwritten by a corporation which has undertaken for a profit to insure the obligee against a failure of performance on the part of the principal obligor. Such a contract should be interpreted liberally in favor of the subcontractor, with a view of furthering the beneficent object of the statute."

The decisions upon this point are collected and

digested in an exhaustive note to the case of *Hormel v. Amer. Bonding Co.* (Minn.), in 33 L. R. A. (N. S.) 513; and also in *50 Corpus Juris,* Sec. 133, pp. 80, 83, where the rules and principles above stated are set forth as established law. See also *Walker on Fidelity Bonds,* p. 31.

The law in the State of Pennsylvania is the same:

"A corporation engaged in furnishing surety bonds for a money consideration, is in law an insurance company, and must be treated as such, in determining questions regarding its liability to the obligees in such bonds."

S. Phila. State Bank v. National Surety Co., 288 Pa. 300;

Young v. American Bonding Co., 228 Pa. 373.

"In Pennsylvania, the rule of strict construction, applied to contracts of ordinary suretyship, does not prevail, where the bond or undertaking is executed upon a consideration, by a corporation organized to issue such bonds or undertakings for profit: *Young v. American Bonding Co.,* 228 Pa. 373; *Phila. v. Fidelity & Dep. Co.,* 231 Pa. 208; *Brown v. Title Ins. & Guaranty Co.,* 232 Pa. 337; *Phila. v. Ray,* 266 Pa. 345. * * * A provision in the bond itself that it 'shall be construed strictly as one of suretyship only' is unavailing, and will not prevent the surety company from being held to the liability of an insurer, *M. E. Church v. Equitable Surety Co.,* 269 Pa. 411, 415."

Our position on this point is: That the terms of this Bond are broad enough to cover all defaults of the Treasurer, whereby the Union sustained any pecuniary loss. That the rule of *strictissimi juris,* which is applied in favor of ordinary sureties, does not apply to this case; but the Surety Company is an insurer for

compensation, and must be held to that responsibility. Doubtful points are to be construed most favorably to the Union, the insured party, and all intendments made in its favor, in order that the indemnity against losses, which was the purpose of the contract, shall be made effectual, in conformity with the views of this Court expressed by Justice Harlan in the case of *Paully, supra.* This rule and the cases supporting it are not "beside the issue" in this case; but are directly in point and are decisive of the issue as the facts appear.

III.

The Treasurer's Defaults.

George Kondor, the Treasurer, whose fidelity was insured to the Union, made default in several points, about the facts of which there is now no dispute.

It is the duty of a "Treasurer" to keep safely the funds which come into his custody, and keep account thereof, and have them ready to turn over to his principal whenever properly called for. Authorities for this proposition seem hardly necessary, but we cite:

2 Abbott's Law Dictionary, Title Treasurer, p. 600;

3 Thompson on Corporations, 3 ed. secs. 1670, 1675.

And in this case the liability of the surety for defaults of the Treasurer is expressly provided for in paragraph (6) of the Bond, R. p. 36.

Mr. Kondor failed in this duty completely. There is no dispute about the fact, that when he was called upon to pay over money in his hands, on March 31, 1924, to the amount of $89,000.00, he could not, and did not produce the money. What he did in the matter merely aggravated his fault. The proven facts are that he gave

his checks for that amount,—after pressure by the other officers of the Union,—on the Peoples State Bank of Johnstown, of which he was the president, and in which he then had funds of the Union on deposit to the amount of $241,000.00; and payment was refused by the Bank for want of cash to meet the demand. Thereupon at once an investigation of said Bank was begun by the office of the Pennsylvania State Commissioner of Banking, which resulted in finding that said Bank was in such condition that it could not pay more than twenty to forty per cent. of its deposits on liquidation then, which would cause a loss of from $140,000.00 to $180,000.00 to the Union, while the Treasurer's bond was for only $100,000. See testimony of H. J. Phillips, R. 56; M. Yuhasz, Sr., R. 82.

It is now admitted that there was an actual default of the Treasurer, which entailed a great pecuniary loss to the Union, and the Surety Bond was forfeited and the Surety Company's liability accrued. As was said by Buffington, J. in his opinion in this case on the first appeal, *Greek Catholic Union v. American Surety Company,* 25 Fed. Rep. (2 Series) p. 31: "The liability of the Surety had accrued and a loss of some $140,000.00 was apparent." "The liability of the surety company became fixed when Kondor violated his official duties, and loss had accrued."

There were other defaults of said Treasurer, shown by the testimony, viz: he violated the by-laws in that he carried in his open checking account, a much larger amount than was permitted by the special provisions of the by-laws on that subject; he did not keep the funds of the Union on deposit in a "safe" bank, but the very reverse; he kept all said funds in the bank of which he was president, with a capital of only $50,000.00, and which he knew was unsafe for such large deposits as he

made for the Union; he did not fulfill his duties about paying out moneys appropriated to be paid on Mortuary Accounts, but retained the checks sent him by the President and Financial Secretary for that purpose, thereby holding funds in said Bank which he should have paid out. Testimony of Phillips, R. 61 and 64; Jendricks, R. 73; Kourlos, R. 105. By-laws, Art. 7, Sec. 32 (4), R. p. 32.

The facts with respect to all these defaults are fully shown in the evidence, and was submitted to the jury on the trial by Judge Gibson in a full and fair charge, see Record, pp. 185-195; and the verdict of the jury was for the plaintiff below the Greek Catholic Union, and there is no dispute about them now.

IV.

The Agreement Made By the Union With the U. S. Trust Company, for Minimizing Loss.

The chief stress of the Surety Company's defense in this case is laid upon the fact that this agreement was made, and, as it alleges, varies its obligation under said surety bond and substitutes a new risk to its prejudice. *This contention is not true.*

The facts about the making of this agreement, as shown in the Record, are as follows:

When the Supreme Officers of the Union learned that the checks for $89,000.00 which they had drawn, and which the Treasurer had signed, to be used in payment for certain investments which they had agreed to make, would not be paid, because the Peoples State Bank, in which the funds of the Union to an amount of $241,000.00 or more were deposited, had not the money available to pay them, they, said Supreme Officers, at once arranged for a meeting of the Supreme Assembly

of the Union, which is the Board of Directors of the corporation, to be held and have the situation of said Bank and the Treasurer's accounts investigated.

That meeting took place at Johnstown, Pa., on Friday afternoon, April 4, 1924. The Union Officers went to the Peoples State Bank at that time and found the representatives of the Pennsylvania State Banking Commissioner examining the books, etc., of the Bank, said examination having been called for by the officers of said Bank, without the knowledge of the Union. Mr. Graff, the Deputy State Banking Commissioner, told Mr. Yuhasz, the president of the Union, not to present those checks, or he would have to close the bank; but he was trying to arrange with some other bank in Johnstown to take over the Peoples State Bank, to save the situation. Testimony of Graff, Rec. p. 61 and Yuhasz, Rec. pp. 81-82.

The examination of the bank's affairs, and the negotiations with officers of other banks went on during the next day and night, Saturday, April 5th, the officers of the Union also participating in the examination. No satisfactory result was reached that day nor evening. Sunday morning at about 2 o'clock A. M., Mr. Ralph Davis, of counsel for the Union, communicated by telephone from Johnstown, with Mr. Benham, a vice president of the Surety Company at Pittsburgh, who had executed this Bond for the Company, and informed him of the situation at Johnstown. The situation as far as it had then developed, and as Mr. Davis told Mr. Benham, was that the Peoples Bank could not pay said Treasurer's checks, and that the Banking Commissioner would not allow the bank to open on Monday morning unless arrangements were made to have a deposit of $100,000.00 made by either the Union or the Surety Company, before that time; or arrangements were made to have the bank taken over by a solvent bank, negotia-

tions for which were pending but not so far successful; and it was added that a representative of the Surety Company should attend there at once, which would not have been impossible.

Mr. Benham disclaimed authority to act for the Surety Company in such a case, and referred Mr. Davis to Mr. McGinn in New York, the officer of the Surety Company in charge of claims. Mr. Davis got Mr. McGinn by telephone at his residence in New York about 10 o'clock A. M. of that same day; but he disclaimed authority to act individually for the Surety Company in such a case. So the officers of the Union were left to act alone in the situation without help of advice from the Surety Company (R. p. 94).

It is incorrect to argue, as is done in our opponents' Brief, that Judge Buffington was misled by the form of the allegation in the Statement of Claim, into error in the language he used in the first decision of this case by the Circuit Court of Appeals, and that said error was perpetuated in the trial, and on the second appeal. There was no error. When the Judge said that "the insurer, with knowledge of the loss, left the insured to meet the situation alone", that was true. The *loss* had accrued when it was known that the treasurer had made default, and of that fact, and of the fact that it then appeared that said loss would very greatly exceed the amount of the surety's bond, Mr. Davis' conversation with Vice President Benham and Claim Adjuster McGinn fully apprised the Surety Company. What Mr. Davis did not attempt to tell them was just how great the loss would be; nor did he tell them of the proposition of the United States Trust Company to take over the Peoples' Bank, for that proposition had not then been made. It is true that these officers of the Surety Company declined to do anything at that time,

and so the Union was left to take care of the situation without aid or counsel from the Surety Company. And when, early Monday morning the proposition for the agreement with the Trust Company was developed, the officers of the Union had to act upon it themselves without further consultation with the Surety Company.

The negotiations with Johnstown Banks, continued however during Sunday, April 6th, and before midnight of that day, the United States Trust Company of Johnstown, an institution satisfactory to the Banking Commissioner, and to the others present and concerned, made a proposal to take over said Peoples State Bank, and pay its depositors in full upon the condition that the Union would leave $200,000.00 of its deposit stand with said Trust Company, without interest, for four years. This proposal was discussed during that day and night, and was finally agreed to and a written agreement was prepared, and submitted to the Board of Trustees of the Union, a quorum of whom had remained in Johnstown and were called together for action. See Testimony of M. Yuhasz, Sr., pages 83-93, and John Macey, page 97 of Record. A copy of this written agreement is shown as Exhibit "F" at page 179 of the Record. As executed it contains the provision that the Union should keep a deposit of $200,000.00 with the Trust Company, without interest for four years; which was an essential condition upon which said Trust Company agreed to enter into the contract. Testimony of Phillips, Record p. 59.

If this agreement had not been assented to, the Bank would not have opened the next morning, but would have been in the hands of the State Banking Commissioner for liquidation.

The examination of the Peoples State Bank's books and assets made by the Bank Examiners, and concurred in by the Auditors of the Union, as above stated showed

that if said bank should be forced into liquidation, by the Banking Commissioner, through a receiver in the usual way, it would pay only from twenty (20) to forty (40) per cent. of the deposits. Testimony of M. Yuhasz Record, page 82; Phillips, Record, pages 53-56.

These facts, with respect to the making of this agreement, clearly show that the officers of the Union were acting in a vital emergency, and that they had to decide and act without any aid or advice from the Surety Company; also that their object in the action they took was to save loss, both for the Union and for the Surety Company, and that their action did in fact so operate, as much or more for the advantage of the surety as for that of the Union.

As we have said above, this surety bond, is in fact and in law an insurance policy; and the rights and obligations of the parties are to be judged and applied as in case of such a policy; the Union being the insured, and the Surety Company being the insurer.

V.

A Case of Salvage By the Insured.

The situation at Johnstown on April 5th to 9th, 1924, was analogus to that of a burning building in which insured property was kept. In such case the insured owner of the goods must use all reasonable efforts to remove them to a place of safety. Generally, he is so required by the express terms of the insurance policy, but without such express requirement, it is his reasonable duty to do so, and minimize the loss of the insurer to such degree as is practicable in the case. He is not penalized for his efforts in trying to save what can be saved from the loss, by withholding from him the right to recover anything on his policy. The insurer gets the benefit of the well intentioned efforts of the insured, and

gets credit on the policy for the value of the salvaged property, but is always liable for what loss remains after that credit is given.

We cannot cite any case in which an insurer undertook to avoid the whole policy because the insured endeavored to minimize the loss by efforts at salvage. Probably no such case ever occurred. But it is well settled law, in fire insurance cases, that such action for salvage taken by the insured is proper. And where goods thus in good faith attempted to be saved have been damaged, lost or stolen, without fault of the insured, in the process of such attempts at salvage, such losses are held to be within the coverage of the policy, for which the insurer must pay. If no effort to save the goods had been made they would have been lost. The fact that the well-meant efforts of the insured to save them were not successful, because they were eventually lost, though not by the fire directly, does not relieve the insurer from liability for them as included in the loss insured against.

> "If it became necessary to remove the goods in order to prevent their destruction by fire, and if in consequence of the measure thus taken, some of the goods were lost or destroyed, although by theft, the insurers will be answerable for the loss, *because it is a sacrifice for their benefit.*" (Italics are ours.)

Instruction by Hare, J.—affirmed by Supreme Court in: *Insurance Co. v. Agnew,* 34 Pa. 96.

See also:

Lukens v. Insurance Co., 25 Legal Int. 61;
Insurance Co. v. Cuff, 35 L. R. A. (N. S.) 892, and cases cited in note;
Insurance Co. v. Patterson Drug Co., L. R. A. 1917 D. 1091.

An insurance company is liable, under a fire policy, for goods lost while in process of removal from a building on fire. This is true with respect to goods in a building endangered and to some extent damaged, though the goods would have neither been burned nor injured had they been left in the building.

4 Cooley's Briefs on Ins. 3065.

So also is there analogy with the case in marine insurance where the master of a vessel in peril may jettison cargo in order to save the ship. If such cargo is insured, the insurance is not forfeited by this fact.

2 Arnold Marine Insurance, Secs. 908 et seq.

According to the rules established by the cases which we have cited above, the "bond" in this case is to be considered as a policy of insurance and the liability of the Surety Company is to be determined by the rules and principles applicable to insurance contracts. Applying these rules and principles to this case, the loss of interest on the impounded deposit of $200,000.00 is clearly a sacrifice made to prevent the much greater loss which would have occurred if that agreement had not been made, and the insurer has the benefit thereof, and is liable to reimburse the plaintiff.

VI.

The Effect of the Agreement on the Surety Company's Liability.

The Surety Company, at the trial, took the position that the Union, by entering into that agreement had greatly prejudiced its rights as surety on said Bond.

That position of the Surety Company was set forth in its Fourth Request for Instructions, which the Court below refused, and which is now urged as an Assignment of Error. That point is shown on page 203 of the Record, and is as follows:

"4. The agreement between the plaintiff Union and the States Trust Company of Johnstown having effected material variance in the defendant's contract of suretyship and having permitted the affairs of Peoples State Bank to be liquidated and its assets collected by said Trust Company instead of a Receiver to be appointed by the Banking Department of the State of Pennsylvania, removed from defendant Surety Company all possibility of participation in any salvage therefrom, and of proving said variance to have been prejudicial and said defendant is thereby relieved of the burden of showing that said variance was prejudicial to it."

That point was rightly refused and there was no error of law in that ruling.

This Bond is *an Indemnity Insurance Contract.* It is true that if in such a contract the insured agrees to a material variance of the terms of the contract or relationship between him and the party whose fidelity is insured to the prejudice of the insurer, the latter may be thereby relieved of its obligation. But such relief is very narrowly limited to cases where there is truly such a variance, and it is actually material, and is or will be actually prejudicial to the insurer's rights and interests.

The contract with the U. S. Trust Company did not alter or vary the terms of the Surety Bond in any way whatever. There was no agreement with the Treasurer, altering his position in the case; there was no agreement made under which the Surety Company was made liable for anything for which it was not already liable. Upon the failure of the Peoples Bank to honor the Treasurer's checks his bond was breached, and the fact, but not the precise amount of the Surety's liability was likewise then fixed. The agreement with the Trust Company had nothing to do with those features of the case. *What*

it had to do with, and was intended for, was the ascertainment of the amount of the loss which must be sustained by the Union as the result of the Treasurer's default. The purpose of it was to minimize that loss, for the benefit both of the Union and the Surety, and it did so operate in fact.

There was no variation of the contract in this case. But even if there be a variation of such a contract, that fact does not relieve the insurer of his obligations, unless he was injured or prejudiced thereby. The law of Pennsylvania is clear on this point.

> "A corporation engaged in the business of suretyship for profit cannot successfully defend merely because of a change in the contract insured; it *must prove* that the change was material, and prejudicial."
>
> *Phila. v. Ray,* 266 Pa. 345.

Those words were quoted with approval in *Sokoloff v. Fidelity & Cas. Co.,* 288 Pa. 211, 215. The same rule was applied in *Conroy v. Commercial Cas. Ins. Co.,* 292 Pa. 219, 228.

A similar rule prevails in the Federal Courts,

> "In contract of this kind," (indemnity insurance) "to escape liability, *the insurer must show,* that the breach is something more than a mere technical departure from the letter of the bond—that it is a departure which results in *substantial prejudice and injury* to its position in the matter.
>
> *Parmelee v. Aetna Life Ins. Co.,* 166 Fed. 741.

The case of *St. Louis Dressed Beef Co. v. Maryland Casualty Company,* 201 U. S. 173, is a case of a bond given for indemnity against loss and damage by reason of negligence of the employees and vehicles of the in-

sured in total amount of $10,000.00. In the operation of one of the insured vehicles a woman was run down and very seriously injured. The Insurance Company being notified of the facts refused to recognize its liability, (on grounds which it was decided were not tenable). Suit was brought by the injured woman for $10,000 damage and by her husband for $3000 damage. The Insurance Company being notified to defend this suit refused to do so. The insured made what was considered a very favorable compromise with the plaintiffs for an amount of $2500 in all, for the damages for both, and brought suit against the Surety Company for that amount. This suit came to the Supreme Court by certificate from the Circuit Court of Appeals, and the Supreme Court decided that the plaintiffs should recover, saying *inter alia,* that "a sum paid in the prudent settlement of a suit is paid under the compulsion of the suit just as truly as if it were paid upon execution;"—though the bond and policy in this case provided specifically that "no settlement should be made by the insured without consent of the surety, nor any suit brought to recover any loss, except loss actually sustained and paid in satisfaction of a judgment after trial, etc."

For the Union we contend that there was in this case no variation or departure from the terms of the original contract. The Surety Company's contract was to insure the fidelity of George Kondor as treasurer, and to make good to the plaintiff loss which it might sustain by reason of his defaults in that office. He defaulted, loss was sustained, and it is for that, that we are suing in this suit.

The fact that the amount of the Union's loss is affected by a later agreement made with another party for the purpose of minimizing that loss, constitutes no variation or departure from the original contract on the

bond. The bond contains no stipulations as to how the loss which might occur should be ascertained or computed.

If the defendant, the Surety Company, had shown that the agreement made with the United States Trust Company for the purpose of minimizing the loss in the case was harmful to it and, now that it is all over, has resulted in loss that it would not otherwise sustain, it might bring itself within the limitations of the rule in question, but it has done nothing of the kind. It offered no evidence directed toward that issue. All the evidence in the case shows that it, the Surety Company, was substantially benefited by the arrangement. Its loss was minimized to an extent even greater than was that of the plaintiff, which was the amount claimed in this suit.

On the contrary, under the facts presented and proven to the jury, the agreement entered into resulted in a saving to the Surety Company. See Plaintiff's Exhibit "E" (R. p. 177) and testimony of E. R. Cherry (R. p. 69), being a statement showing the condition of the Peoples State Bank at the time of closing, which shows in round numbers that the frozen assets, to wit, loans and discounts, bonds, real estate, furniture and fixtures, and deficit, those which were not quickly collectible, amounted to $399,000, and the cash and quick assets amounted to $98,000. The depoits amounted to $403,800. The capital stock, surplus, undivided profits, etc., amounted to $82,000. Upon immediate liquidation of the Peoples State Bank on April 7, 1924, by the distribution of the quick assets to depositors, that is $98,000 cash and quick assets to $403,800 worth of deposits, there would have been then a 24% dividend, the time for the payment of which would be indefinite. The Union would have received 24% of its $241,000 deposits or

$57,840. If the Surety Company had paid its $100,000 bond, the Union would then have received $157,840, or a loss to it of $83,160, and to the Surety Company of $100,000, but that was not done. What was done was liquidation by the United States Trust Company under the Agreement, which at the end of four years, the period for which interest lost under the Agreement is claimed, was shown to have resulted as follows: There was collected from the assets the sum of $259,000 or 64% of its liabilities. This would have meant a dividend to the Union of $154,240 (64% of its deposit of $241,000). If the Surety Company had paid the $100,000 bond at the beginning, so as to entitle it, according to the terms of the bond, to share proportionately with the Union in the distribution, then to be made, it would have received 100/241 of this dividend or $64,000 as its share of the distribution. In the meantime it would have lost the interest on the $100,000 payment for four years, which amounts to $24,000, so that its total loss would have been $60,000. Perhaps, some dividends would have been declared in the meantime, effecting payment of a portion of the $64,000 before the expiration of four years, which would have reduced the interest; but had this liquidation been in the hands of a Receiver for the State Banking Department, the only alternative if the Agreement had not been made, there would have also been paid the Receiver's fees, costs and expenses of the operation, which would have reduced the amount for distribution at least as much as to balance the credit on account of interest. Thus by operation of the Agreement the Surety Company's liability is reduced to only $41,600, the amount of the Union's claim, whereas under the most favorable liquidation proceedings extending over a period of four years, its loss would have been in round numbers $60,000.

These figures are taken from Exhibit "E" (Record p. 177), and testimony of the witnesses presented to the jury by the Union. No evidence relating to or bearing upon this question was presented by the Surety Company. All these facts, together with such others as were in the possession of the United States Trust Company or the State Banking Department of the Commonwealth of Pennsylvania, could have been secured and presented by the defendant if it had assumed the burden which the law placed upon it of showing that the original agreement worked to its prejudice. It is a matter of common knowledge that a forced liquidation by a receiver appointed by the court under the jurisdiction of the State Banking Department would not have resulted in the collection of as large a part of the assets of the Peoples State Bank as would be and were received from the liquidation by a local bank over a period of time without court costs, receiver's fees and other expenses.

The burden was on the Surety Company to show that it had actually sustained prejudice by the making and carrying out of said agreement with the Trust Company; but it showed no such loss or prejudice and it made no effort to do so. It offered no testimony on that point, and the only testimony was that from the Union's witnesses on the trial of the case, by which it is shown after four years that the liquidation as conducted really saved the Surety Company a large sum of money, and that it would have had to pay much more than the amount for which this judgment calls; unless the State Banking Department had been much more successful in liquidation than the Trust Company was, of which there is no evidence and no probability.

As above stated there was no change in the contract between either the Union and the Surety Company, or

between the Union and George Kondor, the principal on the bond, and the burden is heavy upon the Surety Company to show that the agreement so made and carried out caused it material damage or prejudice. The testimony of the Union, which was put in for the purpose of furnishing the jury with all of the facts, resulting from this unfortunate situation, should be construed in favor of the Union and the failure of the Surety Company to present any facts or to cross-examine the witnesses as to these facts can be readily presumed to show that the defendant could not have produced any facts in its favor.

The only answer which the Surety Company makes to this argument is that the contract made with the U. S. Trust Company varied the terms of the original contract upon which it had given its bond, because it prevented the Surety Company from having any opportunity to exercise the right of subrogation, and to show that on proper liquidation of said Bank its loss would not have been much as it is under this judgment.

This argument is fallacious. The only alternative to the making of this agreement was that the Pennsylvania State Banking Commissioner would take over the defaulting bank, close it and place it in process of forced liquidation in the usual method in such cases, that is, by a receiver appointed by the Banking Commissioner. The Surety Company would have had no chance whatever to get the assets of the defaulting bank in its control for liquidation, unless, perhaps, it had been willing to give security satisfactory to the Banking Commissioner that all the obligations of the defaulting bank to its depositors, and also to its stockholders, would be paid in full. The Banking Commissioner could not have permitted a third party to take the assets of the defaulting bank out of his control on any other terms, and there is no likelihood that the Surety Company would have made any

such terms; consequently, if the agreement had not been made, the liquidation of the assets of the Peoples State Bank would have been conducted in the ordinary form of a receiver under the State Banking Commissioner, and the experience of such liquidations has always been that the loss to the depositors and others would be greater than where the liquidation was conducted, as it was, in the present case, by a friendly bank in the immediate neighborhood and well acquainted with the whole situation.

VII.

Fallacy of Argument of the Surety Company Under the Facts of the Case.

The argument advanced by the Surety Company to the effect that if this judgment should be affirmed and become the law of the land, the effect would be very injurious to the business of writing surety bonds, requiring all companies engaged in that business to revise their calculations, on which their schedules of premiums have been arranged, and require higher premiums to be charged for such insurance than have been prevailing, is not sound in this case. *There is no foundation for it in the facts of the case.* It is based purely on assertions of which *no proof of the truth has been offered.* There is not a word of testimony to show upon what calculations the premium charged for this bond was based. Nothing to show that the Surety Company did not include such risks as this in its calculations. The Court is asked to assume that such is the case upon the mere assertion of counsel, which is too violent an assumption to be made in the circumstances of the case. The argument is one *ab inconvenienti*, which at its best is a weak form of argument; for it asks the Court to decide against the logical conclusions of existing law, and the manifest

justice and equity of the claim in this case, *because,* as it says, great inconvenience would result to the business of bonded suretyship,—without a line or word of proof that the assertion is true, for this Company in this case, or for any other company in any case. If such harm will be done by this decision, the proposition was surely capable of some sort of proof, but none has been offered.

On the other hand the proof clearly shows that this was no other risk than that originally assumed by the Surety Company, viz., to indemnify the Union from any loss, excepting only one sustained by a material variance of the terms of its Bond actually prejudicial to the Surety. As a matter of fact, and fully developed by the testimony in this case, no new additional risk was imposed upon the Surety Company by the agreement made by the Union in this case; none is or will be placed upon it, nor could any such increased burden of risk be imposed by applying the principles and affirming the conclusion of this argument, to wit, the right of the insured to make an agreement to minimize the loss after it has accrued. Rather, in this instance, *the Surety Company, is clearly shown to have had its liability reduced, and in all probability its risk lessened.*

It is true that the agreement prevented a closing of the Peoples Bank by the State Banking Commissioner and a liquidation by a Receiver. If that procedure is a right which the Surety Company thinks it is entitled to assert under its contract, then it must be admitted that it was deprived thereof, and deprived of opportunity to show how much it might have gained by that procedure. But the facts show how utterly futile such procedure would have been for the Surety Company. It is common knowledge that liquidation in that way is not *economical;* and the Union has produced the facts clearly showing that the liquidation under the agreement was de-

cidedly to the advantage of the Surety Company. In other words, the proceedings under the agreement as we have shown them, were as good as could be expected in such a situation as is now disclosed by the evidence in this case, and the Surety Company was saved a large sum of money by the operation. It is idle to argue that it was deprived of a right to have subrogation so as to make claim against funds in the hands of a receiver, when it appears that by the operation of the agreement it got greater benefit by the definite fixing of its loss, than it could hope to get from such a receivership.

The facts regarding the actual liquidation of this bank were just as accessible to the Surety Company as to the Union. The Union was able to prove them; and that being so how can the Surety Company now argue that it was deprived by said Agreement of any opportunity to show that the loss sustained by it would have been less than it was? It had full opportunity to produce all the facts on that subject, but made no effort to do so, *because those facts were against its claim,* as we have shown.

The Union's contention is that by this Bond it was contracted to be indemnified against all loss by the defaults of the treasurer, and that it had a right,—perhaps an obligation—to do anything practicable to reduce such loss; provided its action did not cause greater loss to the Surety than would have occurred otherwise. It has shown the facts, which clearly prove that what it did was beneficial to the Surety, not harmful, in any sense. The burden of proof is on the Surety in such a case to show that the acts of the insured were prejudicial to it, which it did not do in this case; *but the Union did prove the contrary;* and the Surety Company is now in the position of contending that although it was largely benefited by the Agreement, as it was intended it should

be,—yet on a *mere technicality* it should be held to be discharged of all its obligations under the bond. In other words the rule of *strictissimi juris* would be invoked in its favor, though the law has been established by the decisions of this Court and other Courts of the States, that that rule does not apply to a compensated surety, who makes a business of such bonds.

In all fairness and equity, the Surety Company should not be permitted to escape its liability under this bond to the amount charged against it in this suit, whereby it is manifest that *it has been saved the difference between $100,000.00 and $41,600.00 under its paid fidelity insurance bond,* by which it obliged itself to indemnify the Union against all loss or damage resulting from the acts of said Treasurer, George Kondor.

VIII.

Conclusion.

The Surety Company, plaintiff in error, bases its appeal on three assignments of error which raise the questions considered in this argument.

The first assignment is that there was error in not granting a request by the Surety Company for binding instructions in its favor. This is a request for binding instructions and was properly refused. The defaults of the Treasurer were based upon facts which were disputed by him and the appellant. Such had to be left to a jury; they were submitted to it by the Court and the jury resolved them in favor of the plaintiff below. The facts leading to and upon which the agreement were entered into were for the jury. Because the Surety Company failed to produce any facts for submission to the jury, which might have shown prejudice to it in the signing of the agreement, could not prevent the jury

from passing upon the facts submitted to it by the plaintiff. In addition the credibility of the witnesses was for the jury. The Court as a matter of law could not have withdrawn the case from the jury or have given binding instructions.

The second assignment is that the Circuit Court of Appeals erred in refusing to find and hold that the material variance of the risk insured by appellant, whereby a new hazard not covered by the bond was sought to be imposed upon the appellant and it was deprived of opportunity both for subrogation and for obtaining proof that the variance was prejudicial, constituted a full defense to the claim against the surety. This assignment, as it is stated, assumes that the contract made by the Union with the United States Trust Company was a material variance of the contract of insurance in this case, *which assumption is erroneous,* as we have argued heretofore in Section VI of this Brief.

This assignment is further explained by the third assignment which repeats the assignments of error relied upon by the Surety Company in the Circuit Court of Appeals and alleges there was error in the Circuit Court of Appeals in not sustaining its position, and this particular point of the material variance of the agreement made with the United States Trust Company is contained in the fourth request of the Surety for instructions to the jury at the trial, which the trial court refused, and which we have discussed at the beginning of our Section VI; and it is also embraced in the Union's eighth point, R. 202, for instructions to the jury at the trial which the trial court below affirmed.

Under the law, the Surety Company had the right to prove, if it could, that the variance alleged was prejudicial to it. The Court as a matter of law could not charge that the agreement removed all possibility of

proving it to have been prejudicial to the Surety Company. His Honor, Judge Wooley, in referring to an "issue of prejudice" undoubtedly referred to the legal liability resting upon the Surety Company to sustain an allegation of such "prejudice" when it is in issue. Of course, the Surety Company could not, nor could any one else, show by testimony what would have been the result had the Commissioner of Banking taken over the Peoples State Bank; appointed a receiver according to law, with the attendant receiver's and attorney's fees, court costs and other costs and expenses. Yet there was nothing to prevent the Surety Company from proving what actually did happen. It could have produced, by subpoena, if necessary, all the books and records of the Peoples State Bank, the books and records of the United States Trust Company the records of the Banking Commissioner of the Commonwealth of Pennsylvania, and from them have shown exactly what became of the assets of the Peoples State Bank and what amount of salvage was recovered from these assets by the United States Trust Company. From those records and facts, it could have shown wherein this agreement was prejudicial to it, if such were a fact. The Surety Company produced no such available testimony and it is therefore fair to presume as true, that the assets of the Peoples State Bank as actually collected by the United States Trust Company, without receiver's or attorney's fees, court costs or other costs and expenses, were insufficient, if distributed as salvage among the parties that would have been entitled thereto, to have reimbursed the Surety under its right of subrogation in a sum which would have saved it as much as did the agreement entered into. The records relied upon by the plaintiff to show the situation to the court and jury were presented and the Surety Company had the same right to the use of the records. If those records had shown that the agreement deprived the Surety Company of a large

amount of salvage secured from the assets of the Peoples Trust Company such, if believed by the Court and jury, would have entitled it to a verdict in its favor.

The Surety Company refused to produce such testimony, because such was not the fact, and requested the Court to charge that, because its right of subrogation was taken away, it was relieved of liability, whether the action of the Union was either beneficial or prejudicial to it.

This is almost exactly the same question submitted to the Court in the case of *U. S. Fid. etc. Co. v. Golden Brick Co.*, 191 U. S. 416, and the Supreme Court answered the question in the negative. Therefore, the Court properly refused the point.

The assignments of error are not sustained by the record and this appeal, therefore, should be dismissed.

Respectfully submitted,

THOMAS STEPHEN BROWN,
RALPH C. DAVIS,
Counsel for Defendant in Error.

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Supreme Court of the United States

OCTOBER TERM, 1931.

NO. 401

AMERICAN SURETY COMPANY OF NEW YORK,
Petitioner,

v.

THE GREEK CATHOLIC UNION.

PETITION FOR REHEARING.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

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v.

THE GREEK CATHOLIC UNION.

PETITION FOR REHEARING.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

To the Honorable the Judges of said Court:

The petition of the Greek Catholic Union, by its counsel, Thomas Stephen Brown and Ralph C. Davis, respectfully prays the Court to grant a rehearing in the above entitled proceeding, for the following reasons:

(1) The Court, in its opinion, states: "It appears, however, by the administration of the United States Trust Company, the debts have been paid almost in full and some assets of doubtful value remain". The above statement of fact by the Court is contrary to the true facts of this case. Under the laws of the Commonwealth of Pennsylvania, and as laid down by the Circuit Court of Appeals, such a fact, if so, should have been proven as a defense by the Surety Company. Therefore, the statement of the witness under examination was a mere general one, and the true facts in regard thereto were

not offered in evidence. Plaintiff was prepared to prove, if the burden placed upon the Surety Company, as counsel understood the law to be, prior to this decision, had been assumed by it; that then, under the favorable administration of the United States Trust Company, the facts would show that the Surety Company was saved much more than the amount claimed in this suit.

(2) The Court in its opinion states: "There is nothing in the instrument which by the furthest stretch of construction can be said to undertake the loss due to an agreement of the corporation to substitute some other bank or trust company for the Peoples Bank." Nowhere in the record nor as a fact was there any attempt to substitute any other bank or trust company for the Peoples Bank. The Greek Catholic Union did not allege nor did it attempt to prove in any way that the Surety Company was liable or could be held liable for any act, actions, or failure to act of the United States Trust Company. There was no attempt by the insured to substitute any other bank or trust company, nor any new obligation of any kind whatsoever upon the surety. The Peoples Bank was not mentioned in the bond as the depository. The By-Laws required the Treasurer to keep the funds in a safe bank or banks without any designation of such bank or banks, except that they should be safe. When it was found that the Peoples Bank, in which the Treasurer was keeping the money, was unsafe, it was no violation of the bond or any feature thereof for the Union to require the money to be kept in a safe bank, as the United States Trust Company, whether Kondor continued as Treasurer or not; and there is no claim that Kondor's surety was liable for any failures on the part of the new depository with respect to payment of interest on funds. Nowhere in the record are there any facts upon which the Court can base its opinion that the insured substituted a new and different

liability from any undertaken in the instrument of suretyship. The only liability claimed of the Surety Company was that arising from the admitted breach of the treasurer.

(3) The Court in its opinion states: "The voluntary action of the respondent in making an entirely new agreement whereby in effect it loaned $200,000.00 to the United States Trust Company for four years without interest, caused the loss for which this suit is brought." This seems to us to be a mistaken conclusion from the facts proven in the case, and probably arose from the mistake of fact earlier in the opinion, where the court states: "The trust company proceeded with the liquidation of the affairs of the former bank, and at the expiration of the stipulated four year period paid the respondent the remaining $200,000. Respondent then brought this action". Suit was brought in the Common Pleas Court of Allegheny County, Pennsylvania, on or about March 24th, 1925, and as shown by the docket entries (Record, page 1) exemplification thereof was filed April 30th, 1925, in the District Court three years before the expiration of the stipulated four year period. The cause of the loss, as shown quite distinctly by the evidence, was the default of the Treasurer Kondor, which default brought the Greek Catholic Union into a position where something had to be done, a desperate emergency. The agreement with the United States Trust Company was made for the purpose of saving loss which was shown to be sure to follow. That agreement did not cause a loss, but saved a loss, and was a benefit to both the Union and the Surety Company, as it is quite clearly shown by the evidence and the facts. To view the case in the light that the agreement made for purposes of salvage was the cause of the loss seems to us to be a complete misconception of the situation. Undoubtedly, according to the facts, if that agreement had not been made, the loss

both to the Union and to the Insurance Company would have been greater than the amount we claim.

Respondent made no claim, nor are there any facts in the record, upon which the Court could base its opinion that the loss claimed by it was for any interest or money or damages of any kind arising from or out of any action or actions or lack or failure thereof, of, or by the United States Trust Company.

(4) Prior to this decision, the law was that an insured, by reason of an alleged variance to escape liability, must show that the alleged breach was more than a mere technical departure from the letter of the bond,—that it was a departure which results in substantial prejudice and injury to its position. That it must prove that the change was "material and prejudicial". Whether such variation occurred prior or subsequent to an alleged breach should not affect a general principle of law. To hold that said principle of law applies prior to a breach but does not hold subsequent thereto means that an insured may, prior to a breach, modify a surety contract without releasing the insurer, unless the insurer proves it was material and prejudicial, but that subsequent to a breach an insured can do nothing either to protect itself or its surety without thereby releasing the insurer.

(5) Counsel for the Greek Catholic Union respectfully represents that this case was tried, upon the law, as counsel understood it to be prior to this decision, that having proven conclusively "the breach for which indemnity was to be afforded was Kondor's default in the performance of his duties and with respect to the protection of the funds of the corporation", or, as stated otherwise in the opinion of this Court, "The parties agree that Kondor's conduct, with respect to the deposit in the Peoples Bank, was a breach of his obligation, and

entailed a liability upon the bond", that the burden was then placed upon the Surety Company to prove that the subsequent acts created a material variance to the prejudice of the Surety Company. Counsel believed that the Surety Company was required to prove more than a mere technical variation, to-wit, the deprivation of the insured of the right of subrogation, unless the actual facts showed such to be to its prejudice. Counsel knew that the Surety Company would not be able to so do for the reason that the Union's actions as shown by the resulting facts were for the benefit of the Surety Company. These facts are not in the realm of conjecture nor was it necessary to prove the consequences of an event that never happened. The Union can prove what actually happened and that the result thereof was to the benefit of the Surety Company. These facts can be proven by the books of the Peoples Bank, as shown by audits of its accounts by the officers of the State Banking Department of the Commonwealth of Pennsylvania, by the officers of the United States Trust Company and by the audit made by the auditor of the Surety Company itself.

(6) The Court in its opinion states "Where an insured without the agreement of the insurer undertakes to substitute a new obligation under a new agreement with a third party in lieu of those arising from a breach of the officer whose fidelity is insured, thus substituting a new and different liability from any undertaken in the instrument of suretyship, and depriving the insurer of the right of subrogation, such conduct operates to discharge the obligation of the indemnity contract."

Petitioner respectfully suggests that the facts of this case are not within the above principle. No new obligation was substituted, the surety company was under no obligation of any kind with reference to the agreement with the United States Trust Company.

There was no new and different liability substituted from that undertaken in the instrument of suretyship. The insurer was deprived of the right of subrogation, but, under the facts of this case, to its benefit, which facts can be proven, and respondent should be afforded an opportunity to so prove, if the Court will remand this case for retrial.

THOMAS STEPHEN BROWN,
RALPH C. DAVIS,
Counsel for Greek Catholic Union.

We hereby certify that the foregoing petition is presented in good faith and not for delay.

THOMAS STEPHEN BROWN,
RALPH C. DAVIS,
Counsel for Greek Catholic Union.

CORRECTED COPY

SUPREME COURT OF THE UNITED STATES.

No. 401.—October Term, 1931.

American Surety Company of New York, Petitioner, *vs.* The Greek Catholic Union. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[February 15, 1932.]

Mr. Justice Roberts delivered the opinion of the Court.

The petitioner executed in favor of the respondent a bond in the sum of $100,000 conditioned upon the payment of pecuniary loss the corporation should sustain through the failure of one Kondor, its treasurer, faithfully to perform his duties as prescribed by the constitution and by-laws, or through his failure to keep intact and absolutely to account for all funds of the corporation. Kondor violated his duty by depositing with the Peoples State Bank of Johnstown, Pennsylvania, of which he was president, a sum greatly in excess of that permitted by the by-laws to be lodged in any one depositary. The bank became embarrassed and the state banking department instituted an investigation of its affairs. The amount on deposit to the credit of respondent was found to be over $241,000; and checks for $89,000 had been prepared for signature by Kondor as treasurer and were about to be issued. The representatives of the state determined that if these checks were issued and presented for payment they could not be met out of the bank's available resources and the institution would have to be closed and placed in the hands of an official liquidator.

News of the situation reached certain executive officers of the Union who lived in Pittsburgh, and they came to Johnstown with their attorneys. They were informed that unless $100,000 additional cash was deposited with the bank the state would not permit the institution to honor the checks for $89,000. In this exigency counsel for the respondent called up an official of the petitioner at Pittsburgh and was advised by him that he had no

authority to act in the premises. The only one to whom he could refer counsel was the general claim agent of the petitioner, who lived in New York. When reached by telephone he stated that he had no authority to pay or deposit $100,000, that such a matter would have to be referred to the executive committee. He was told that negotiations were under way to have another bank or trust company in Johnstown take over the assets and liabilities of the Peoples Bank, that a definite arrangement would have to be reached in less than twenty-four hours, and that the petitioner should have someone representing it come at once to Johnstown to join in the conferences on this subject. It does not appear that a promise was made that any such person could or would arrive in time to take part in the matter. This conversation took place on a Sunday morning. Late the same night a contract was entered into between the Peoples State Bank and the United States Trust Company of Johnstown whereby the latter assumed all the liabilities of the bank, except for its capital stock, in consideration of the conveyance of all its assets. The trust company was unwilling to make this agreement unless respondent would stipulate to leave with it $200,000 of the existing deposit with the bank for four years without interest. To assure the consummation of the transfer the respondent executed such an undertaking. The trust company proceeded with the liquidation of the affairs of the former bank, paid checks for some $41,000 of the deposit standing to the credit of the respondent, and at the expiration of the stipulated four year period paid the respondent the remaining $200,000.

Respondent ~~then~~ brought this action, alleging Kondor's breach of duty under the by-laws and his failure to keep intact the moneys entrusted to him as treasurer, and the consequent liability of petitioner on its bond. The declaration detailed the facts we have summarized, asserted due notice of breach to the surety, and its failure to meet the accruing liability; recounted the arrangement made in order to save loss, and claimed some $41,000 of interest lost to the corporation by reason of Kondor's default and the resulting agreement with the United States Trust Company made necessary thereby. The amount demanded was made up by showing that for four years $200,000 of the respondent's moneys had yielded no income, and that in conformity with the by-

laws all of these funds would have been promptly invested except for Kondor's default; that the corporation normally earned five per cent. on investments, and had lost the opportunity to earn at that or any rate by reason of having to leave the $200,000 on deposit with the United States Trust Company without interest. The petitioner filed a statutory demurrer which was sustained by the District Court, whose decision was overruled by the Circuit Court of Appeals (25 F. (2d) 31) and the case remanded for further proceedings. A trial on the merits resulted in a verdict and judgment for the amount claimed. The Circuit Court of Appeals affirmed (51 F. (2d) 1050). This court granted certiorari.

At trial the court affirmed a point for charge presented by respondent, which permitted the jury to find whether the arrangement entered into between respondent and the United States Trust Company created a material variation of the surety's risk. Petitioner presented a point to the effect that the agreement with the trust company created a material variance in the contract of suretyship, deprived the surety of recovery of salvage from the Peoples State Bank, and relieved the petitioner of the burden of showing that the variance was prejudicial. This was refused.

The parties agree that Kondor's conduct with respect to the deposit in the Peoples State Bank was a breach of his obligations and entailed a liability upon the bond; that the ascertainment of Kondor's defaults and notice thereof to the surety matured the surety's obligation to pay the loss sustained up to $100,000; that if petitioner had made such payment it would have been entitled to be subrogated to the rights of the respondent against the Peoples State Bank and Kondor, and that the course adopted by the officers of the Union deprived the surety of any opportunity to pursue the Peoples State Bank. In its brief and at bar respondent conceded that the telephone conversations with petitioner's employees on the eve of entering into the agreement with the United States Trust Company in no way affected the reciprocal rights and liabilities consequent on Kondor's defaults. These agreements and concessions narrow the issue presented to the question whether the arrangements made and approved by the officers of the obligee so varied the risk as to release the obligor from liability under its bond. The court below was of opinion the exigency which confronted the Union's officers was similar to one which

an insured faces when a fire occurs, and the efforts at salvage ought not to be held a prejudicial variation of the hazard; that the burden rested upon petitioner affirmatively to prove that what was done increased its risk, and that the trial judge properly left this question as one of fact to the jury.

We cannot agree with this view. Assuming that respondent is right in its contention that the obligation here was in the nature of an insurance contract rather than one of strict suretyship (*American Surety Co.* v. *Pauly*, 170 U. S. 133, 144; *United States F. & G. Co.* v. *Golden P. B. Co.*, 191 U. S. 416, 423), and that consequently a variation of the risk does not *ipso facto* discharge the insurer, who in order to escape liability must prove that the change was material and prejudicial, it remains, as a practical matter, that what was done made proof of actual detriment impossible. If the bank had been closed, the surety would have remained liable for the penal sum named in the bond, and upon payment thereof would have been subrogated to the respondent's rights against the bank and the defaulting treasurer. Whether the resulting loss would have been more than $41,000 no one can tell. The state authorities, from such examination as they had made, were of the opinion that the depositary might pay from twenty to forty per cent. of its liabilities. It appears, however, that by the administration of the United States Trust Company the debts have been paid almost in full, and some assets of doubtful value remain to be converted. The action of the Union's officials has placed the question of probable prejudice due to the adoption of one of the two alternatives presented wholly in the realm of conjecture, and respondent now seeks to cast upon petitioner the burden of proving the consequences of an event which never in fact occurred.

The cases relied on by respondent have to do with an alteration of the terms of a principal obligation prior to any breach, and without the surety's consent. They address themselves to the question whether such a change discharges the indemnitor from liability consequent upon a breach. *Young* v. *American Bonding Co.*, 228 Pa. 373; *Philadelphia* v. *Fidelity & Dep. Co.*, 231 Pa. 208; *Brown* v. *Title Guaranty & Surety Co.*, 232 Pa. 337; *Philadelphia* v. *Ray*, 266 Pa. 345.

The instant case presents an altogether different situation. A breach had occurred which entailed a loss for which the bondsman was liable; and thereafter the obligee, without consulting the surety, entered into a wholly new arrangement relative to the recoupment of such loss. The claim is that this action was in fact in the interest of the surety and saved it money, and that if this is not true, the surety must assume the burden of proving what would have been the result of refraining from the attempt to minimize loss. We are referred to no authority in support of this position, and we think it unsound as applied even to the case of a paid surety company, which is often treated as an insurer merely.

Viewed in another aspect, the facts preclude a recovery. The cause and genesis of the loss was not one of the events specified in the bond on which payment was conditioned. The defaults for which the petitioner agreed to be liable were clearly defined. The bond guaranteed against fraud, dishonesty, forgery, theft, etc. of the treasurer; against his neglect faithfully to perform his duties as prescribed by the constitution and by-laws; against his omission to keep intact and absolutely to account for all the funds of the corporation; and against the failure of any bank or trust company in which he might deposit such funds. There is no evidence that the loss occurred through the fraud, dishonesty, or forgery of Kondor. It did not arise from the failure of the depositary, for the bank was not allowed to fail. The breach for which indemnity was to be afforded was Kondor's default in the performance of his duties and with respect to the protection of the funds of the corporation. There is nothing in the instrument which by the farthest stretch of construction can be said to undertake the payment of a loss due to an agreement of the corporation to substitute some other bank or trust company for the Peoples Bank. The voluntary action of the respondent in making an entirely new agreement, whereby in effect it loaned $200,000 to the United States Trust Company for four years without interest, caused the loss for which the suit is brought. In view of the situation confronting it the Union thought well to incur the risk of losing that interest. It cannot now ask that the bond be rewritten to cover an event not therein specified or contemplated. Where an insured without the agreement of the insurer undertakes to substitute a new obligation under a new agreement with a third party

in lieu of those arising from a breach of the officer whose fidelity is insured, thus substituting a new and different liability from any undertaken in the instrument of suretyship, and depriving the insurer of the right of subrogation, such conduct operates to discharge the obligation of the indemnity contract.

Judgment reversed.

Mr. Justice McReynolds is of opinion the judgment should be affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.